No. 04-1152

Title:	Donald H. Rumsfeld, Secretary of Defense, et al., Petitioners v. Forum for Academic and Institutional Rights, Inc., et al.
Docketed:	February 28, 2005
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Nos.:	(03-4433)
Decision Date:	November 29, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 28 2005	Petition for a writ of certiorari filed. (Response due March 30, 2005)
Feb 28 2005	Appendix of Donald H. Rumsfeld, Secretary of Defense, et al. filed.
Mar 30 2005	Brief of respondents Forum for Academic and Institutional Rights, Inc., et al. in opposition filed.
Mar 30 2005	Brief amici curiae of Richard Pombo, et al. filed.
Apr 13 2005	DISTRIBUTED for Conference of April 29, 2005.
Apr 15 2005	Reply of petitioners Donald H. Rumsfeld, Secretary of Defense, et al. filed. (Distributed)
May 2 2005	Petition GRANTED.
Jun 3 2005	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including July 18, 2005.
Jun 3 2005	Brief amicus curiae of Judge Advocates Association filed.
Jun 6 2005	Brief amici curiae of Center for Individual Rights, et al. filed.
Jul 15 2005	Brief amicus curiae of American Legion filed.
Jul 15 2005	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
Jul 15 2005	Brief amicus curiae of Pacific Legal Foundation in support of Neither Party filed.
Jul 18 2005	Joint appendix filed.
Jul 18 2005	Brief amicus curiae of National Legal Foundation filed.
Jul 18 2005	Brief of petitioners Donald H. Rumsfeld, Secretary of Defense, et al. filed.
Jul 18 2005	Brief amici curiae of Christian Legal Society and Alliance Defense Fund in support of neither party filed.
Jul 18 2005	Brief amici curiae of Law Professors and Law Students filed.
Jul 18 2005	Brief amicus curiae of Boys Scouts of America filed.
Jul 18 2005	Brief amici curiae of Admiral Charles S. Abbot, et al. filed.
Jul 18 2005	Brief amici curiae of Texas, et al. filed.
Jul 18 2005	Brief amici curiae of Richard Pombo, et al. filed.

Jul 18 2005	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed.
Jul 25 2005	Motion for leave to file amicus brief filed by American Civil Rights Union. (Distributed)
Jul 25 2005	SET FOR ARGUMENT on December 6, 2005.
Jul 26 2005	Extension of time within which to file respondent's brief on the merits to and including September 21, 2005.
Aug 5 2005	CIRCULATED.
Sep 20 2005	Brief amici curiae of 56 Columbia Law School Faculty Members filed. (Distributed)
Sep 20 2005	Brief amici curiae of NALP (The National Association for Law Placement), et al. filed. (Distributed)
Sep 20 2005	Brief amicus curiae of Cato Institute filed. (Distributed)
Sep 21 2005	Brief of respondents Forum for Academic and Institutional Rights, Inc., et al. filed. (Distributed)
Sep 21 2005	Brief amici curiae of Columbia University, et al. filed. (Distributed)
Sep 21 2005	Brief amicus curiae of American Association of University Professors filed. (Distributed)
Sep 21 2005	Brief amicus curiae of Servicemembers Legal Defense Network filed. (Distributed)
Sep 21 2005	Brief amici curiae of Student/Faculty Alliance for Military Equality (SAME) and Outlaws filed. (Distributed)
Sep 21 2005	Brief amicus curiae of Association of American Law Schools filed. (Distributed)
Sep 21 2005	Brief amici curiae of Robert A. Burt, et al. filed. (Distributed)
Sep 21 2005	Brief amicus curiae of National Lawyers Guild filed. (Distributed)
Sep 21 2005	Brief amici curiae of Bay Area Lawyers for Individual Freedom, et al. filed. (Distributed)
Sep 21 2005	Brief amici curiae of William Alford, et al. filed. (Distributed)
Sep 21 2005	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Sep 21 2005	Brief amici curiae of National Lesbian and Gay Law Association, et al. filed. (Distributed)
Oct 3 2005	Motion for leave to file amicus brief filed by American Civil Rights Union GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Oct 26 2005	Reply of petitioner Donald H. Rumsfeld, Secretary of Defense, et al. filed.
Nov 25 2005	Record received from U.S.D.C. for the District of New Jersey (Newark). (1 box)
Nov 25 2005	Record received from U.S.C.A. 3rd Circuit. (1 box)
Dec 6 2005	Argued. For petitioners: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. For respondents: E. Joshua Rosenkranz, New York, N.Y.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DONALD H. RUMSFELD, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GREGORY G. KATSAS
Deputy Assistant Attorney General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the court of appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Donald H. Rumsfeld, Margaret Spellings, Elaine Chao, Michael O. Leavitt, Norman Y. Mineta, and Michael Chartoff. Respondents are Forum for Academic and Institutional Rights, Society of American Law Teachers, Coalition for Equality, Rutgers Gay and Lesbian Caucus, Pam Nickisher, Leslie Fischer, Michael Blauschild, and Erwin Chemerinsky.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of Donald H. Rumsfeld, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 390 F.3d 219. The opinion of the district court (Pet. App. 82a- 184a) is reported at 291 F. Supp. 2d 269.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Solomon Amendment, 10 U.S.C. 983[1], is set forth in the appendix to this petition (Pet. App. 185a-188a). The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

1. Article I of the Constitution vests Congress with the power to "raise and support" military forces for the defense of the United States. U.S. Const. Art. I, § 8, Cl. 12. Enlisting qualified men and women in the military is essential in fulfilling that task. Except when military exigency has required resort to conscription, Congress traditionally has relied on voluntary enlistment as the most effective means of meeting its staffing needs. As a result, the defense of the United States depends on the ability of the armed forces to attract men and women of the highest possible caliber.

To meet that challenge, Congress has long required the armed forces to "conduct intensive recruiting campaigns" to encourage military enlistments. 10 U.S.C. 503(a)(1) (codifying Armed Forces Voluntary Recruitment Act of 1945, ch. 393, § 2, 59 Stat. 538). As the demands of military service have grown more complex, the military has placed increasing emphasis on recruiting students from colleges and universities. However, some institutions of higher education have sought to restrict campus recruiting by the military.

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[1] The Solomon Amendment was amended by Congress on October 28, 2004. All references to the Solomon Amendment in this petition are to the statute as currently amened.

In 1994, Congress enacted legislation that directed the Department of Defense to withhold funds from institutions of higher education that denied military recruiters access to campuses and students. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A, Tit. V, § 558, 108 Stat. 2776. Two years later, Congress amended the legislation to extend the funding condition to funds provided by several other federal agencies. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-271. That funding condition is popularly known as the Solomon Amendment, after the Member of Congress who originally introduced it, and it is codified as amended in 10 U.S.C. 983.

Under the Solomon Amendment, specified public funds are not provided to an "institution of higher education," or a "subelement" of such an institution, if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. 983(b)(1). The Solomon Amendment does not demand a fixed level or degree of access; it simply asks the institution to provide military recruiters with equal access relative to what the institution provides to other employers. Even so, the Solomon Amendment does not mandate equal access, but it does condition federal funds on equal access, such that the institution cannot deny equal access and simultaneously receive the specified federal funds.

The Solomon Amendment applies to all institutions of higher education except ones with "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. 983(c)(2). The Act governs all funds made

available through the Department of Defense, the Department of Homeland Security, the Department of Health and Human Services, the Central Intelligence Agency, and other enumerated agencies. 10 U.S.C. 983(d)(1). The Act does not apply to funds provided to educational institutions or individuals "solely for student financial assistance, related administrative costs, or costs associated with attendance." 10 U.S.C. 983(d)(2).

The Solomon Amendment rests on two related legislative judgments. The first is that restrictions on military recruiting at colleges and universities interfere with "the Federal Government's constitutionally mandated function of raising a military." 141 Cong. Rec. 595 (1995) (Rep. Solomon). As Representative Solomon explained during a floor debate:

> [R]ecruiting is the key to our all-volunteer military forces, which have been such a spectacular success. Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and colleges and informing young people of the increased opportunities that a military tour or career can provide. That is why we need this amendment.

142 Cong. Rec. 16,860 (1996); *id.* at 12,712 (Rep. Goodlatte) ("Campus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people," and institutions that exclude military recruiters "interfere with the Federal Government's constitutionally mandated function of raising a military.").

The second legislative judgment is that *equal* access is critical to effective military recruiting. As originally enacted, the text of the Solomon Amendment did not

expressly refer to equal access. The Department of Defense interpreted the Act to condition federal funding on equal access, however, and Congress amended the law in 2004 to ratify that administrative interpretation. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811. The House Committee report accompanying the 2004 amendment explained the importance of equal access:

> [A]t no time since World War II, has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs. Successful recruitment[, in turn,] relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to [that of] other employers.

H.R. Rep. No. 443, 108th Cong., 2d Sess. Pt. 1, at 3-4 (2004). In implementing that judgment, Congress once again did not impose a direct requirement on all colleges and universities, but instead provided that affording equal access in recruiting shall be a condition on the receipt of federal funds by those colleges and universities that choose to accept them.

2. Since 1990, the American Association of Law Schools (AALS) has required its members to withhold "any form of placement assistance or use of the school's facilities" from employers who discriminate on the basis of sexual orientation or other specified criteria. C.A.

App. 349, 353 (AALS Bylaws §§ 6-4(b), 6.19). The AALS takes the view that the military runs afoul of that policy as a result of the Act of Congress concerning homosexuality in the armed forces. See 10 U.S.C. 654. Nonetheless, following enactment of the Solomon Amendment, the AALS excused members from complying with that policy if they took steps to "ameliorate" the perceived impact of military recruiting on the student body. See AALS Memorandum 97-46 (Aug. 13, 1997) <http://www.aals.org/97-46.html>. In response, most law schools allowed military recruiters to enter their campuses, but many law schools refused to provide military recruiters with the same access that they offered to other employers. Pet. App. 99a. The Department of Defense subsequently clarified that the Solomon Amendment conditions federal funding on *equal* access, and notified law schools that the failure to provide equal access could jeopardize their federal funds. *Id.* at 101a.

3. In September 2003, the Forum for Academic and Institutional Rights—an association of certain law schools and law school faculties—and others (respondents) brought this suit against Secretary of Defense Donald R. Rumsfeld and others (petitioners) in the United States District Court for the District of New Jersey. Pet. App. 10a. Respondents alleged, *inter alia*, that the Solomon Amendment violates the First Amendment rights of law schools. *Id.* at 12a. Respondents immediately moved for a temporary restraining order and a preliminary injunction. *Id.* at 86a. The district court denied the request for a temporary restraining order, but required petitioners to respond to the preliminary injunction motion within seven days. *Ibid.* The district court subsequently denied respondents' request for a preliminary injunction. *Id.* at 82a-184a.[2]

Applying the First Amendment standard for laws that affect expressive conduct, see *United States* v. *O'Brien*, 391 U.S. 367 (1968), the district court held that the Solomon Amendment does not violate respondents' First Amendment rights. Pet. App. 161a-166a. The court reasoned that the Solomon Amendment furthers the important government interest in raising a volunteer military, *id.* at 162a-163a, that the military's recruitment effort will be less effective if military recruiters are denied equal access to campuses and their students, *id.* at 164a, and that the Solomon Amendment

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[2] In the same decision in which it denied a preliminary injunction, the district court also denied the government's motion to dismiss the complaint for lack of standing. The district court held, on the basis of the allegations in the complaint, that a broad range of plaintiffs in addition to FAIR, including individual students and faculty members, student organizations at two law schools, and a national association of law professors, had standing to challenge the constitutionality of the Solomon Amendment. Pet. App. 84a-86a, 103a-128a.

The court of appeals affirmed the district court's holding that respondent FAIR has standing, and therefore did not find it necessary to determine whether any of the other respondents have standing. Pet. App. 10a-11a n.7; see *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986). FAIR's list of member law schools and faculties is secret, and at the time the motion to dismiss was filed, none of its members (nor, consequently, their alleged injuries) had been specifically identified. *Id.* at 108a. The district court held that the secrecy of the membership did not defeat standing. *Id.* at 108a-114a. The court also noted that in its second amended complaint, FAIR identified two of its members, Golden State University School of Law and the faculty of Whittier Law School. *Id.* at 14a. As we did below, we concede that respondent FAIR has standing, at a minimum, to represent identified law schools. See *id.* at 10a n.7.

does not seek to suppress ideas. *Id.* at 165a-166a. The court emphasized that institutions are free to denounce the military's policies without risking the loss of federal funds. *Id.* at 166a.

4. A divided panel of the Third Circuit reversed. Pet. App. 1a-81a. The panel majority held that respondents are likely to prevail on their claim that the Solomon Amendment violates the First Amendment, and it directed the district court to issue a preliminary injunction against its enforcement on that basis. *Id.* at 11a-48a.

Initially, the court of appeals viewed the Solomon Amendment's funding condition as the equivalent of a direct regulatory requirement that institutions afford military recruiters equal access to their campuses and students. Pet. App. 11a-12a n.9. The court then held that the Solomon Amendment is subject to strict scrutiny under the First Amendment on two grounds. *Id.* at 13a-15a.

First, the court concluded that the Solomon Amendment directly burdens the right of educational institutions to engage in expressive association. Pet. App. 15a-22a. The court reasoned that the presence of military recruiters on campus would force law schools to send a message that they accept discrimination against homosexuals as a legitimate form of behavior. *Id.* at 18a. Second, the court concluded that the Solomon Amendment implicates the compelled speech doctrine because it forces laws schools to propagate, accommodate, and subsidize a message with which they disagree. *Id.* at 25a-39a. In the court's view, the Solomon Amendment requires law schools to convey the message that all employers are equal, and to facilitate the military's statements that homosexual applicants may not serve. *Id.* at 32a.

Applying strict scrutiny, the court concluded that the government had failed to establish that there are no alternative means for effective recruitment of military personnel that would be less restrictive than the Solomon Amendment. Pet. App. 22a-24a. The court suggested loan repayment programs and television and radio advertisements as two such alternatives. *Id.* at 23a.

The court of appeals also concluded that respondents would be entitled to a preliminary injunction if the *O'Brien* standard rather than strict scrutiny were applicable. Pet. App. 43a-47a. The court held that a denial of equal access to military recruiters involves expressive conduct. *Id.* at 43a-44a. And it found that the government was required to supply evidence to the district court that the Solomon Amendment enhances the military's recruitment effort in order to sustain the Amendment under *O'Brien*. *Id.* at 45a.

Judge Aldisert dissented. Pet. App. 48a-81a. Applying the *O'Brien* framework, he concluded that the Solomon Amendment is constitutional. *Id.* at 78a-81a.

5. The government filed a motion in the court of appeals to stay the mandate pending the filing of this certiorari petition. By order dated January 20, 2005, the court of appeals granted a stay. By order dated February 2, 2005, the court denied respondents' motion to reconsider the stay.

REASONS FOR GRANTING REVIEW

Effective recruitment is essential to sustain an all-volunteer military, particularly in a time of war. The Solomon Amendment reflects Congress's judgment that a crucial component of an effective military recruitment program is equal access to college and university campuses.

Based on its conclusion that the Solomon Amendment likely violates the First Amendment, the court of appeals in this case has directed the district court to enjoin enforcement of the Solomon Amendment. That injunction would undermine military recruitment during a time of war.

The court of appeals' constitutional analysis is seriously flawed. The court held that the Solomon Amendment interferes with expressive association and compels speech, but it does neither. The equal access condition applies only if institutions voluntarily choose to receive the specified federal funding. If institutions do not wish to associate with military recruiters or their speech, they may decline to associate with the federal funding. Neither the association, nor the receipt of federal funs, nor the equal access policy is compelled. Furthermore, the Solomon Amendment does not even force institutions that choose to accept federal funds to give military recruiters some predetermined level of access. It simply requires the institutions to give the military the same access to their facilities and students as they choose to give other outside employers. The Solomon Amendment does not seek to affect federally funded institutions' selection of their own internal membership. Nor does it ask the institutions to adopt the statements made by military recruiters as their own. To the contrary, institutions that voluntarily accept federal funding remain free to protest the military's policies and to make clear that they do not agree with them.

Because the court of appeals' decision calls into question the constitutionality of an important Act of Congress and directs entry of a preliminary injunction barring its enforcement, because that decision is based on a flawed constitutional analysis, and because the

decision undermines military recruiting during time of war, review by this Court is warranted.

I. THE COURT OF APPEALS ERRED IN ITS CONSTITUTIONAL ANALYSIS

A. The court of appeals held that the Solomon Amendment interferes with expressive association and compels speech, triggering the application of strict scrutiny under the First Amendment. That holding is incorrect. The Solomon Amendment does not interfere with expressive association or involve compelled speech.

1. Relying on *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), the court of appeals held that the Solomon Amendment impairs a law school's right to expressive association. Pet. App. 15a-22a. The court's reliance on *Dale* is misplaced.

In *Dale*, the Court invalidated a state law that required the Boy Scouts to accept gay men as leaders of their organization. The Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648. Applying that standard, the Court found that "Dale's presence as an assistant scoutmaster would * * * surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," because it would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653-654.

Under the *Dale* analysis, the Solomon Amendment does not burden a law school's right to expressive association. Unlike the state law at issue in *Dale*, the

Solomon Amendment is not concerned with an institution's method of determining its own internal composition and organization: it does not establish criteria for the selection of administrators, faculty, or students. Recruiters are not a part of the institution itself and do not become members through their recruiting activities. To the contrary, the role of recruiters is to attract students to seek employment *outside* the school. Such employment is an integral part of the economic activity of the Nation, and it has long been subject to governmental regulation through anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) and the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*), as well as numerous other laws. Educational institutions do not have any unique constitutional immunity to the application of laws that secure equal access to employment opportunities for their students or otherwise regulate employment and associated activities, such as recruiting. A school could not, for example, assert a "*Dale* right" to exclude minority-owned enterprises from the recruiting process. Indeed, most employment laws apply fully to a university's relationship with its own employees, who are engaged in its internal affairs. See, *e.g.*, *University of Pa.* v. *EEOC*, 493 U.S. 182 (1990). And of course, the Solomon Amendment takes as a given the recruiting program that the university itself has chosen to establish and requires only that military recruiters be afforded equal access to it. The Amendment thereby in turn ensures that the university's students will have equal access to military recruiters.

Furthermore, unlike the state law at issue in *Dale*, the Solomon Amendment does not force an institution to take an implicit position on an issue that is inconsistent with its beliefs. Because a scout leader purports

to speak for the Boy Scouts, there was a serious risk that the presence of a homosexual scout leader would send a message to its youth members and the world that the Boy Scouts approve of homosexual conduct. In contrast, recruiters speak for the employers they represent and do not purport to speak for the educational institutions they visit. There accordingly is no serious risk that the personnel rules and other laws and policies governing the armed forces would be regarded by the school's students or faculty, or by the outside world, as reflecting the views of the school.

That is particularly true because the Solomon Amendment simply seeks to put military recruiters in the same position as other employers, and those other employers also do not speak for the institution. No one would suppose, for example, that a law school endorses the "message" that is embedded in the work of each of the many prospective employers who might visit the campus to recruit, from corporate law firms, public interest groups across the ideological spectrum, and federal, state, and local governments. To the extent that a law school nonetheless wants to ensure that its faculty and students or the outside world will not erroneously perceive that it endorses the perspectives or policies of the United States military or other prospective employers that recruit on campus, the law school is free to make appropriate disclaimers or to express its disagreement with any policy or any recruiting organization.[3]

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[3] Members of a law school community are not similarly situated to impressionable "youth members" of the Boy Scouts. They participate in a vibrant academic atmosphere in which ideas and legal principles are vigorously attacked and defended and a respect for diverse views is normally encouraged. There is no reason to be-

2. The Solomon Amendment also does not implicate the compelled speech doctrine. That doctrine is triggered when the government compels a speaker to convey an antagonistic message, *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997), and the Solomon Amendment does not *compel* anything, see pp. 15-16, *infra*, let alone require law schools to convey any antagonistic message. The court of appeals stated that law schools "object to conveying the message that all employers are equal," Pet. App. 32a, but a law school that affords military recruiters equal access in response to the Solomon Amendment conveys no such message. Indeed, there is no reason to suppose that the recruiting program on a law school campus that excluded military recruiters would convey a message that all prospective employers are equal. As a general matter, such a program might well convey only the message that the law school *treats* those prospective employers equally, presumably in an effort to make a broad range of options available to a diverse student body whose members are planning to enter the world of work after they leave school.

With military recruiters included, the program may convey the message that the school is more committed to receiving federal money than it is to a particular application of its non-discrimination policy. But that is a choice the school itself has made, and any message that choice might convey to its students or faculty or to the public at large therefore is the *school's* message. In any event, if the law school believes that the presence of military recruiters among prospective employers might actually lead to a misperception about a message

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lieve that the presence of military recruiters on campus threatens such an environment.

conveyed by the law school itself, the school is free to correct that misperception.

The court of appeals also stated that law schools object to statements made by military recruiters that openly homosexual students are ineligible for military service. Pet. App. 32a. But such a statement, to the extent the subject even came up in a particular interview, would simply report an objective fact about the qualifications for military service; it would not convey a particular message. Furthermore, such a statement would be made by the *recruiter*, not by the law school. In the context of a program in which the law school gives a wide array of employers access to its campus for recruitment purposes, there is no realistic danger that the statements of military recruiters will be uniquely attributed to the school, and the school is free to make its own views clear. See *Pruneyard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980) (where property is not reserved for personal use, where views of speakers will not likely be attributed to property owner, and where property owner can effectively correct any such misimpression through speech of his own, compelled speech doctrine does not apply).

3. There is a further, fundamental flaw in the court of appeals' reliance on the notion of "compelled" speech and on the proposition that the Solomon Amendment impermissibly intrudes into an educational institution's freedom of association. An educational institution covered by the Solomon Amendment has not been *compelled* to do anything. It has voluntarily chosen to enter into grant agreements or contracts *with* the United States and to accept funds under them, subject to a series of conditions, such as that it not discriminate on the basis of race or disability and that it give equal access in recruiting *to* the United States. That is an

entirely permissible quid pro quo in a bilateral relationship, and one that *any entity* that contracted with or made donations to a college or university could reasonably insist upon.

Furthermore, by receiving funding from the United States, an educational institution has voluntarily chosen to *associate* with the United States. Its resulting undertaking—to accord equal access in recruiting to the United States—is an integral feature of that association. The institution's right as an autonomous entity to expressive association in its own internal relationships among its students, faculty, and administration does not confer on it a constitutional right to dictate the terms of its association with autonomous outside entities such as the United States. The educational institution cannot find the United States to be an acceptable partner in financial arrangements promoting the education of its students, and then insist upon a constitutional right to deem the United States unacceptable when it comes to having military representatives on campus, on equal terms with other prospective employers, to recruit those students.

B. The court of appeals held that even if the right of expressive association and compelled speech were not implicated, the Solomon Amendment would be subject to review under the standard for the regulation of expressive conduct set forth in *O'Brien*. Pet. App. 43a-47a. The court of appeals further held that, on the existing record, the Solomon Amendment does not satisfy *O'Brien*'s standard of scrutiny. *Ibid.* That analysis is quite mistaken as well.

The Solomon Amendment is addressed to conduct: an educational institution's denial of equal access to military recruiters. There is nothing inherently communicative about that conduct, and it is not trans-

formed into expression simply because the institution may have announced in advance its *reason* for engaging in the conduct. If such a prior announcement of one's motive were sufficient to trigger First Amendment scrutiny of the government's regulation of the conduct itself, then a broad range of governmental regulation could be affected. The refusal to pay taxes (some portion of which funds the armed forces) or arson of a government building would trigger an analysis under *O'Brien* as long as the actor announced his reasons in advance. Conduct directed at private persons or property would likewise fall under such a rule, such as defacing a building by an animal rights activist who explained his conduct by the fact that the building houses a laboratory conducting animal research.

The Court made clear in *O'Brien* itself, however, that it has "not accept[ed] the view than an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376. And the court of appeals was wrong to do so here. See *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel of expression is not sufficient to bring the activity within the protecton of the First Amendment.").

Even if the act of restricting campus access were sufficiently expressive to come within the scope of the First Amendment, Congress retains the power to deal with the non-expressive harm to military recruiting that arises from that conduct. Under *O'Brien*, a regulation of conduct that imposes an incidental burden on expression is constitutional as long as it furthers a

substantial governmental interest that is "unrelated to the suppression of free expression," 391 U.S. at 377, and that "would be achieved less effectively absent the regulation." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985). Here, the government's interest in recruiting the most qualified men and women for military service is compelling and entirely unrelated to the suppression of expression. Moreover, that recruiting mission would be achieved less effectively if military recruiters have less effective access to campuses and students than other prospective employers.

The court of appeals held that respondents are entitled to a preliminary injunction under *O'Brien* because the government did not present evidence in court to prove that the Solomon Amendment enhances military recruiting efforts. Pet. App. 45a. In employing a rule of equal access, however, the Solomon Amendment relies on the *educational institutions'* own assessments of what is required for effective recruiting on their campuses. When a university allows recruiters to conduct on-campus interviews, provides recruiters with conveniently located interview facilities, makes recruiting literature available through the university's placement office, and offers recruiters assistance in scheduling interviews, it is manifesting its own judgment about what is needed for recruiters adequately to reach potential recruits. And when the university denies those opportunities to military recruiters, while making them available to other potential employers, it is necessarily depriving the military of access that the university itself views as integral to effective recruiting. An educational institution's own expert judgment therefore furnishes a firm factual basis for applying the Solomon Amendment to that institution.

Furthermore, this Court has recognized that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments" depends on "the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Here, there is nothing novel or implausible about the proposition that access to students and campuses enhances recruitment. If on-campus recruitment were not effective, law schools and other departments of colleges and universities would not invite employers on campus, and employers would not incur the considerable costs necessary to take advantage of the offer. A similar operating premise underlies anti-discrimination laws generally, which require equal treatment within the framework of the employment or other policies that the affected entity has adopted to govern its own affairs. It has never been thought that some evidentiary showing in court is required under those laws to prove that equal treatment is in fact necessary or justified.

The court of appeals' insistence upon more proof was particularly misconceived here, because to the extent anything more than common sense is required to support the principle of equal access for military recruiters, Congress's judgment in enacting the funding condition furnishes that support. See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986) (holding that government is not required, in response to Free Exercise Clause claim, to offer evidentiary support to establish need for challenged military dress regulations). Article I assigns the power "[t]o raise and support Armies" to Congress, and Congress has made the judgment that equal access is necessary to "raise and support" military forces of the highest caliber. That judgment is entitled to substantial deference. See, *e.g.*, *Rostker* v.

Goldberg, 453 U.S. 57, 64-65 (1981); *Goldman*, 475 U.S. at 509 (1986).

There is no need in this case, however, to determine as a general matter what showing a person challenging an Act of Congress under *O'Brien* may demand by way of justification from the government. In the context of the Solomon Amendment, when an educational institution has elected to accept federal funding with full awareness of the equal access condition, nothing in *O'Brien* suggests that the First Amendment confers on the institution a right to insist at a later date upon any more of a justification for that condition than Congress's judgment that equal access is appropriate. If the institution did not believe, when it was deciding whether to enter into the various funding agreements, that there was a sufficient empirical justification for the government to insist upon that condition instead of some alternative method of recruiting, it was free to decline to enter into the agreements. That is the same option anyone has to decline to accept a contract offer that he believes is not justified or sufficiently backed up by information furnished by the other party.

C. For the reasons given in Points A and B, *supra*, the court of appeals erred in directing the entry of a preliminary injunction on the ground that the Solomon Amendment infringes upon a law school's freedom of expressive association, triggers the compelled speech doctrine, and has not been justified under *O'Brien*. Even under those First Amendment principles applicable to direct governmental regulation of private conduct, the court's analysis was seriously flawed. But the Solomon Amendment does not constitute a direct regulation of colleges and universities. It is not a mandate of equal access imposed on all institutions. It is a condition imposed on those institutions that

voluntarily associate with the government that they not turn around and deny the government equal access in recruiting.

The Solomon Amendment, therefore, rests on more than Congress's substantive powers under Article I of the Constitution to raise and support armies and otherwise to support the Nation's military. It also rests on the Spending Clause, which confers on Congress the power to "provide for the common Defence and general Welfare of the United States," Art. I, § 8, Cl. 1, as well as Congress's power to enact all laws that are necessary and proper to effectuate its spending power, Art. I, § 18. Specifically, the Solomon Amendment is a condition on an educational institution's receipt of federal funds that are appropriated by Congress for defense and other purposes. Thus, an educational institution that does not wish to associate with the United States' military recruiters may simply decline to seek funding from the United States.

The court of appeals recognized that the Solomon Amendment is a condition on the receipt of federal funds, enacted in the exercise of Congress's spending power, but it rejected the proposition that this feature of the Amendment has any bearing on the constitutional analysis. In the court's view, if the Solomon Amendment would be invalid under the First Amendment as a requirement imposed directly on law schools by Congress, it is equally invalid as a condition on the receipt of federal funds. See Pet. App. 11a-13a & n.9. That conclusion, too, is wrong.

Because the Solomon Amendment is a condition on federal funding, and not a direct regulatory requirement, it implicates Congress's "wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States* v.

American Library Ass'n, 539 U.S. 194, 203 (2003). Under the Spending Clause, Congress may establish criteria for the receipt of federal funding "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 588 (1998). The First Amendment is not inapplicable to Spending Clause conditions. In general, however, Congress exceeds First Amendment limits under the Spending Clause only when it "aim[s] at the suppression of dangerous ideas." *Id.* at 587 (quoting *Regan* v. *Taxation With Representation*, 461 U.S. 540, 550 (1983)); see *Leatherers* v. *Medlock*, 499 U.S. 439, 447 (1991); *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958). Otherwise the recourse for a person who does not wish to be bound by a funding condition is to decline federal assistance.

Under these principles, the Solomon Amendment is valid Spending Clause legislation. The Solomon Amendment is aimed solely at an institution's *conduct* in denying equal access to military recruiters. The Solomon Amendment is entirely indifferent to an institution's reason for denying equal access.

Nor is the Solomon Amendment aimed at the suppression of ideas in any other respect. Educational institutions that receive federal funds are free to criticize the military on whatever ground they wish without risking the loss of federal funds. They may adopt formal resolutions condemning military policies, hold rallies and marches, conduct open forums, and distribute leaflets and posters. Indeed, the record reflects that law schools, their faculties, and their students have engaged in precisely such activities. See, *e.g.*, C.A. App. 103 (law school forum); *id.* at 106-107, 206-207, 255, 302, 382-383 (student and faculty protests); *id.* at 112-113, 114, 232, 261-262 (memoranda

and faculty resolutions); *id.* at 231-232 (ameliorative statements); *id.* at 115 (student bar association resolution); *id.* at 118-121 (protest posters). No educational institution has been denied federal funds for that vigorous and open criticism. To the extent that educational institutions want to distance themselves from military policies more completely and send a less ambiguous message, they may simply decline assistance from the federal government, which advances the policies to which they object.

2. The Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), illustrates the scope of Congress's authority under the Spending Clause. In that case, Grove City College argued that compliance with Title IX's prohibition against gender discrimination in federally funded educational programs would interfere with the First Amendment associational rights of the college and its students. The Court unanimously rejected that contention. 465 U.S. at 575-576. The Court held that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept," and that the college could avoid Title IX's equal opportunity condition by "terminat[ing] its participation in the [educational grant] program." *Id.* at 575.

Like Title IX, the Solomon Amendment seeks to encourage educational institutions to provide equal access; it does not seek to suppress ideas; and it permits institutions to avoid the federal condition by declining federal assistance. Indeed, while Title IX governs the internal relationship between an institution and its students, the Solomon Amendment addresses only one narrow aspect of the relationship between an institution and the federal government itself, and it does so

only with respect to recruiting for prospective employment *outside* the school. Thus, like Title IX, the Solomon Amendment is a constitutional exercise of Congress's authority under the Spending Clause.

II. THERE IS A PRESSING NEED FOR IMMEDIATE REVIEW

A. Invalidating an Act of Congress on constitutional grounds is "the gravest and most delicate duty that [a court] is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). The inherent gravity of that act, and the injury that arises "any time [the government] is enjoined by a court from effectuating statutes enacted by representatives of its people," *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in Chambers), are themselves sufficient to warrant review by this Court. Indeed, the Court routinely grants certiorari when the government seeks review of a lower court decision granting a preliminary injunction on constitutional grounds. See, *e.g.*, *Ashcroft* v. *ACLU*, 124 S. Ct. 2783, 2790 (2004); *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 540 (2001); *Miller* v. *French*, 530 U.S. 327, 335 (2000); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 436 (1992); *Walters* v. *National Ass'n of Radiation Survivors*, *supra*; see also *Saenz* v. *Roe*, 526 U.S. 489, 497-498 (1999) (interlocutory review of constitutionality of state statute).

The need for immediate review in this case is particularly pressing. The court of appeals has directed the district court to enter a preliminary injunction against enforcement of the Solomon Amendment. Pet. App. 48a. Any such injunction would cause serious harm to military recruiting. Moreover, military lawyers play a

vital role in the ongoing combat missions of the armed forces, and the military services depend significantly on campus access to recruit the lawyers they need to carry out their missions. If law schools are nevertheless allowed to deny equal access to military recruiters, and even bar them from campus altogether, without facing the loss of funding, the services' recruiting capabilities, and ultimately their broader capabilities, will be seriously compromised. A decision threatening those results should be given plenary review by this Court.

B. The case is in a posture that is suitable for the Court's review because it presents important legal questions that do not depend for their resolution on further factual development. The court of appeals has held as a matter of law that (1) the Solomon Amendment is subject to strict scrutiny because it infringes on law schools' freedom of expressive association and compels speech, (2) the Amendment in any event triggers heightened scrutiny under *O'Brien* because it interferes with the schools' expressive conduct, (3) Congress's determination that the Amendment is necessary for military recruitment and the recipient schools' own judgment about what is necessary for effective recruiting by other employers is not sufficient to justify similar access by the military, and (4) the Amendment's status as Spending Clause legislation does not affect the constitutional analysis. Those legal holdings are central to the court of appeals' decision concerning the Solomon Amendment's constitutionality, and further factual development is not necessary to review them.

If the Court agrees with the government on the appropriate constitutional analysis, the Solomon Amendment will be sustained, and no further evidentiary proceedings will be necessary. Even if the Court were

to conclude that the constitutionality of the Solomon Amendment required some form of factual inquiry, the Court's decision would significantly advance the course of the litigation by clarifying the nature and scope of that inquiry. For that reason, and because entry of a preliminary injunction would cause serious harm to the United States, the court of appeals' decision warrants immediate review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GREGORY G. KATSAS
Deputy Assistant Attorney General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

FEBRUARY 2005

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DONALD H. RUMSFELD, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4433

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, A NEW JERSEY MEMBERSHIP CORPORATION; SOCIETY OF AMERICAN LAW TEACHERS, INC., A NEW YORK CORPORATION; COALITION FOR EQUALITY, A MASSACHUSETTS ASSOCIATION; RUTGERS GAY AND LESBIAN CAUCUS, A NEW JERSEY ASSOCIATION; PAM NICKISHER, A NEW JERSEY RESIDENT; LESLIE FISCHER, A PENNSYLVANIA RESIDENT; MICHAEL BLAUSCHILD, A NEW JERSEY RESIDENT; ERWIN CHEMERINSKY, A CALIFORNIA RESIDENT; SYLVIA LAW, A NEW YORK RESIDENT, APPELLANTS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE; ROD PAIGE, IN HIS CAPACITY AS U.S. SECRETARY OF EDUCATION; ELAINE CHAO, IN HER CAPACITY AS U.S. SECRETARY OF LABOR; TOMMY THOMPSON, IN HIS CAPACITY AS U.S. SECRETARY OF HEALTH AND HUMAN SERVICES; NORMAN Y. MINETA, IN HIS CAPACITY AS U.S. SECRETARY OF TRANSPORTATION; TOM RIDGE, IN HIS CAPACITY AS U.S. SECRETARY OF HOMELAND SECURITY

Nov. 29, 2004

Before: AMBRO, ALDISERT and STAPLETON, Circuit Judges.

OPINION OF THE COURT

AMBRO, Circuit Judge.

The Solomon Amendment, 10 U.S.C. § 983, requires the United States Department of Defense ("DOD") to deny federal funding to institutions of higher education that prohibit military representatives access to and assistance for recruiting purposes. Last fall, the Forum for Academic and Institutional Rights, Inc. ("FAIR"),[1] an association of law schools and law faculty, asked the United States District Court for the District of New Jersey to enjoin enforcement of the Solomon Amendment. The District Court denied FAIR's motion. *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) ("FAIR"). On appeal, we hold that FAIR has demonstrated a likelihood of success on the merits of its First Amendment claims and that it is entitled to preliminary injunctive relief. Accordingly, we reverse.

I. Background Facts[2] and Procedural Posture

A. Law Schools' Nondiscrimination Policies

Law schools have long maintained formal policies of nondiscrimination that withhold career placement

[1] Joining FAIR in its preliminary injunction motion and in this appeal are: the Society for Law Teachers, Inc.; the Coalition for Equality; Rutgers Gay and Lesbian Caucus; law professors Erwin Chemerinsky and Sylvia Law; and law students Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild. For convenience, we refer to all plaintiff-appellants collectively as "FAIR."

[2] The facts on appeal are not in dispute. As the District Court noted, the Government did not challenge or supplement the factual assertions presented by FAIR in its motion for injunctive relief. *FAIR*, 291 F. Supp. 2d at 277.

services from employers who exclude employees and applicants based on such factors as race, gender, and religion. In the 1970s law schools began expanding these policies to prohibit discrimination based on sexual orientation as well. In response to this trend the American Association of Law Schools ("AALS") voted unanimously in 1990 to include sexual orientation as a protected category. As a result, virtually every law school now has a comprehensive policy like the following:

> [The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation. . . . Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy.

B. Congress Passes the Solomon Amendment

The United States military excludes servicemembers based on evidence of homosexual conduct and/or orientation. *See* 10 U.S.C. § 654.[3] Citing their nondis-

[3] While the current statutory version of the military's exclusionary policy has existed since 1993, National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (Nov. 30, 1993), the military has had formal regulatory policies excluding gays and lesbians since World War I and a practice of such exclusion since the Revolutionary War. *See, e.g.*, Articles of War of 1916, Pub. L. No. 242, art. 93, 39 Stat. 619, 664 (assault with intent to commit sodomy punishable by

crimination policies, some law schools began in the 1980s refusing to provide access and assistance to military recruiters. This caught the attention of members of Congress. In 1994, Representative Gerald Solomon of New York sponsored an amendment to the annual defense appropriation bill that proposed to withhold DOD funding from any educational institution with a policy of denying or effectively preventing the military from obtaining entry to campuses (or access to students on campuses) for recruiting purposes. National Defense Authorization Act for Fiscal Year 1995, Pub.L. No. 103-337 § 558, 108 Stat. 2663, 2776 (1994).

During debate in the House of Representatives, Representative Solomon urged the passage of his amendment "on behalf of military preparedness" because "recruiting is the key to an all-volunteer military." 140 Cong. Rec. H3861 (daily ed. May 23, 1994). He argued that it was hypocritical for schools to receive federal money while at the same time denying the military access to their campuses: "[T]ell[ ] recipients of Federal money at colleges and universities

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court martial); *see generally* Randy Shilts, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military* 11-17 (1994).

Under the current statute, a servicemember is separated from the military if it is found that he or she "engaged in . . . a homosexual act" or "stated that he or she is a homosexual" or "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b). It defines "homosexual" and "homosexual act" to include evidence demonstrating "a propensity or intent to engage in homosexual acts." *Id.* It also allows servicemembers to rebut findings of proscribed conduct with evidence of the lack of a propensity to engage in homosexual conduct, *i.e.*, evidence of a heterosexual orientation. *Id.* Law schools interpret the ban as conflicting with their policies against discrimination on the basis of sexual orientation.

that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your [F]irst [A]mendment right[ ]. But do not expect Federal dollars to support your interference with our military recruiters." *Id.* The amendment's co-sponsor, Representative Richard Pombo of California, said Congress needed to target "policies of ambivalence or hostility to our Nation's armed services" that are "nothing less than a backhanded slap at the honor and dignity of service in our Nation's Armed Forces." *Id.* at H3863. He urged his colleagues to "send a message over the wall of the ivory tower of higher education" that colleges' and universities' "starry-eyed idealism comes with a price. If they are too good-or too righteous-to treat our Nation's military with the respect it deserves[,] then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America." *Id.*

Other Representatives opposed the amendment, alleging violations of academic freedom and civil rights. *See, e.g., id.* at H3862 (Rep. Dellums) ("We should not . . . chill or abridge privacy, speech, or conscience by threatening a college with a Federal funds termination because it chose for whatever reason to deny access to military recruiters. . . . We should not browbeat them . . . into becoming involuntary agents of Federal policy."). In light of Vietnam War-era legislation, rarely invoked, that already granted the DOD discretion to withhold funding from colleges and universities that barred military recruiters, see Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972), the DOD itself objected to the proposed amendment as "unnecessary" and "duplicative." 140 Cong. Rec. H3864 (Rep.

Schroeder) (explaining the DOD's position). The DOD also feared that withholding funds from universities could be potentially harmful to defense research initiatives. *Id.* But the House voted for the amendment by a vote of 271 to 126. *Id.* at H3865. Several months later the Senate approved the defense spending appropriations bill, including Representative Solomon's amendment, and the "Solomon Amendment" ultimately became law.

C. Subsequent Amendments and Regulatory Interpretations

In 1997 Congress amended the Solomon Amendment by expanding its penalty to include, in addition to DOD funds, funds administered by other federal agencies, including the Departments of Transportation,[4] Labor, Health and Human Services, and Education.[5] Omnibus Consolidated Appropriations Act, 1997, Pub.L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996). This amendment was recodified in another amendment in 1999. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-11 (1999). DOD regulations have clarified this expansion, penalizing an offending "subelement" of a college or university (*i.e.*, a law school) that prohibits or effectively prevents military recruiting with the loss of federal funding from all of the federal agencies identified in the statute, while withholding from the offending

[4] Department of Homeland Security funds later replaced Department of Transportation funds. Pub. L. No. 107-296, § 1704(b)(1), 116 Stat. 2314 (2002).

[5] A separate amendment cancelled the application of the Solomon Amendment to direct student aid. Department of Defense Appropriations Act of 2000, § 8120, Pub. L. No. 106-79, 113 Stat. 1212, 1260 (1999).

subelement's parent institution only DOD funds. 32 C.F.R. § 216.3(b)(1).

The 1999 amendment also codified exceptions to the Solomon Amendment's penalties for schools that (1) have ceased an offending policy or practice, or (2) have a longstanding religious-based policy of pacifism. § 549, 113 Stat. at 610(c) (codified at 10 U.S.C. § 983(c)). DOD regulations subsequently added a third exception for schools that provide military recruiters a degree of access equal to that provided to other recruiters. 32 C.F.R. § 216.4(c).

Following the 1999 amendment, the DOD enforced the Solomon Amendment consistent with its terms. Only schools whose policies or practices "prohibit[ed], or in effect prevent[ed]," military representatives "from gaining entry to campuses, or access to students . . . on campuses for purposes of military recruiting," were penalized. Thus, by merely allowing military recruiters to gain access to campuses, many law schools avoided the Solomon Amendment's penalty while reaffirming their opposition to the military's exclusionary employment policy by not providing them affirmative assistance in the manner provided to other recruiters. Harvard Law School, for example, allowed military recruiters on campus to recruit at the offices of its Veterans Association but did not volunteer its placement personnel to arrange interviews. Boston College Law School allowed military recruiters to conduct on-campus interviews, but kept their literature in the library rather than in the career services office. Until the fall of 2001, the DOD did not consider these and other similar "ameliorative measures" to violate the Solomon Amendment and expressed enthusiasm for the law schools' cooperation with what it described as

successful recruiting efforts. *See FAIR*, 291 F. Supp. 2d at 282 (citing record evidence).

But following the terrorist attacks in the United States in September 2001, the DOD began applying an informal policy of requiring not only access to campuses, but treatment equal to that accorded other recruiters. As evidence of this informal policy, a letter from the DOD's Acting Deputy Undersecretary William J. Carr to Richard Levin, the President of Yale University, stated that universities are required "to provide military recruiters access to students equal in quality and scope to that provided to other recruiters."[6] The same letter stated that the "DOD requires that there not be a substantial disparity in the treatment of military recruiters as compared to other potential employers." This changed context meant that Yale's willingness to let military recruiters use a room in Yale Law School's building for interviews would not pass muster unless it also provided military recruiters with the same level of assistance from its career development office (arranging interviews, posting notices, *etc.*) provided to other recruiters. Furthermore, the DOD intimated that failure to comply would result in a loss to Yale University not only of DOD funds, but of all federal funds (a penalty that is not consistent with the DOD's existing regulations, under which the offending subelement's parent institution is penalized with the loss of only DOD funds, *see* 32 C.F.R. § 216.3(b)(1)).

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[6] In wording the new informal policy's substantive requirement, the DOD borrowed language from the existing policy's regulatory exception—32 C.F.R. 216.4(c) (exempting from Solomon Act compliance a law school that "presents evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers").

In another example, the DOD advised the University of Southern California Law School in 2002 that its past practice of accommodating military recruiters—providing them with standard employer information, referring them to the campus ROTC office for scheduling of interview office space, posting notices in the weekly newsletter for students, and making military recruitment materials available to students—would violate the Solomon Amendment unless its career services office invited military recruiters to participate in an off-campus job fair open to other employers. According to the DOD, anything less than equal treatment for military recruiters "sends the message that employment in the Armed Forces is less honorable or desirable than employment with other organizations"—a dangerous message to be sending "in today's military climate." In light of the millions of dollars at stake, every law school that receives federal funds had, by the 2003 recruiting season, suspended its nondiscrimination policy as applied to military recruiters.

This past summer Congress amended the Solomon Amendment to codify the DOD's informal policy. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub.L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004). Now, under the terms of the statute itself, law schools and their parent institutions are penalized for preventing military representatives from gaining entry to campuses for the purpose of military recruiting "in a manner that is at least equal in quality and scope to the [degree of] access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b).

D. Current Litigation

In September 2003, FAIR sued the DOD and the other federal departments whose funds are restricted under the Solomon Amendment, seeking on constitutional grounds a preliminary injunction enjoining enforcement of the statute and the then-existing (now codified) informal policy. The Government defendants moved to dismiss for lack of standing. The District Court denied both the motion to dismiss and FAIR's motion for preliminary injunction. *See FAIR*, 291 F. Supp. 2d at 296, 322. This appeal followed.

II. Jurisdiction

Under 28 U.S.C. § 1331, a federal district court has original subject matter jurisdiction over an action for injunctive relief based on constitutional claims. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 156 n. 12 (3d Cir. 2002), cert. denied, 539 U.S. 942, 123 S. Ct. 2609, 156 L.Ed.2d 628 (2003).[7] Our appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1).

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[7] Standing must also be proper for subject matter jurisdiction to exist. *See, e.g., Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir. 2003); 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531 (2d ed. 1984). The District Court held that FAIR had standing to seek a preliminary injunction against the Solomon Amendment, and the Government has conceded this issue on appeal. Acknowledging our continuing obligation to verify subject matter jurisdiction when it is in question, *see, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102, 104 (3d Cir.), cert. granted on other grounds, — U.S. ——, 125 S. Ct. 310, 160 L.Ed.2d 221 (2004), we affirm the District Court's holding that FAIR's standing was proper for the reasons it provided. *FAIR*, 291 F. Supp. 2d at 285-91.

III. Analysis

To obtain a preliminary injunction FAIR must establish (1) a reasonable likelihood of success on the merits, (2) irreparable harm absent the injunction, (3) that the harm to FAIR absent the injunction outweighs the harm to the Government of granting it, and (4) that the injunction serves the public interest. *Tenafly Eruv Ass'n*, 309 F.3d at 157. While we review a district court's balancing of the preliminary injunction factors for abuse of discretion, we review "any determination that is a prerequisite to the issuance of an injunction . . . according to the standard applicable to that particular determination." *Id.* at 156 (citations omitted). Thus, because the District Court's ruling was based on its application of the First Amendment and other constitutional principles to the Solomon Amendment—issues of law to which a plenary standard of review applies—our review is plenary. *Id.*

A. Unconstitutional Conditions Doctrine

FAIR argues that the Solomon Amendment is an unconstitutional condition.[8] Under the unconstitutional

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While the Government does not concede that the non-FAIR plaintiffs had standing, the presence of one plaintiff with standing is sufficient to satisfy that requirement. *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986).

[8] Our dissenting colleague urges us to begin our analysis with the presumption that congressional statutes are constitutional. It is a fundamental canon of statutory construction that, when there are "'two possible interpretations of a statute, by one of which it would unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.'" *Rust v. Sullivan*, 500 U.S. 173, 190, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S. Ct. 105, 72 L.Ed. 206 (1927)). But in this case it is not argued that there are two possible

conditions doctrine, the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972). If Congress "could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* Put another way, the Government may not propose a penalty to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958) (state could not condition property tax exemption on loyalty oath); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995) (public university could not condition funds for student publications on their secular perspective); *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (FCC could not condition federal funds to radio stations on editorial content). Thus, if the law schools' compliance with the Solomon Amendment compromises their First Amendment rights, the statute is an unconstitutional condition.[9]

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constructions of the Solomon Amendment. The canons of statutory construction therefore do not apply. Moreover, "although a duly enacted statute normally carries with it a presumption of constitutionality, when a [statute] allegedly infringes on the exercise of [F]irst [A]mendment rights, the statute's proponent bears the burden of establishing [its] constitutionality." *ACORN v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983) (citing *Org. for a Better Austin* v. *Keefe*, 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L.Ed.2d 1 (1971)).

[9] As the District Court noted, the Supreme Court's exception to the unconstitutional conditions doctrine for selective spending

B. First Amendment Analysis

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This simple commandment plays out differently depending on the avenue of analysis. Two avenues applicable here are: (1) whether the law schools are "expressive associations" whose First Amendment right to disseminate their chosen message is impaired by the inclusion of military recruiters on their campuses; and (2) whether the law schools are insulated by free speech protections from being compelled to assist military recruiters in the expressive act of recruiting.[10]

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programs does not apply here. *FAIR*, 291 F. Supp. 2d at 299-300. When the Government appropriates for a particular spending program, it may endorse one viewpoint over another by conditioning its spending on certain criteria. *United States v. Am. Library Ass'n*, 539 U.S. 194, 211, 123 S. Ct. 2297, 156 L.Ed.2d 221 (2003) (providing library assistance funds to only those libraries who agree to block obscene Internet sites); *Rust*, 500 U.S. at 192-93, 111 S. Ct. 1759 (funding family planning services that eschew abortion counseling). In those cases, "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196, 111 S. Ct. 1759; *see also Am. Library Ass'n*, 539 U.S. at 211, 123 S. Ct. 2297. That exception does not apply in our case because the Solomon Amendment does not create a spending program; it merely imposes a penalty-the loss of general funds.

[10] FAIR also argues that the Solomon Amendment and the then-existing informal policy are void under the First Amendment's vagueness doctrine because they provide insufficient notice as to what activities will trigger funding penalties. But the statutory amendment enacted during FAIR's pending appeal, *see supra* Part I.C, has rendered moot both the challenge to the Solomon Amendment, *see Black United Fund of N.J., Inc. v. Kean*,

A violation of freedom of speech under either analytical approach draws down the curtain on Solomon Amendment enforcement unless the Government can establish that the statute withstands strict scrutiny. The levels of scrutiny applicable in the First Amendment context are crucial. A regulation that disrupts an expressive association or compels speech must be narrowly tailored to serve a compelling governmental interest, and must use the least restrictive means of promoting the Government's asserted interest (here, recruiting talented lawyers). *See infra* Parts III.B.1(c), 2(e). Needless to say, this is an imposing barrier.

The District Court, by contrast, emphasized a third potential theory of this case that invokes only intermediate scrutiny, *i.e.*, whether the government action at issue furthers an important government interest that would be achieved less effectively without that action. The Court asked whether the law schools' resistance to the Solomon Amendment is sufficiently communicative to bring it within the ambit of the First Amendment's protection for "expressive conduct," the suppression of which receives intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *See infra* Part III.B.3(b). We emphasize at the outset that we need not decide this issue because we conclude that the Solomon

763 F.2d 156, 160 (3d Cir. 1985), and the challenge to the regulatory policy, *see Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004). The recent amendment to the Solomon Amendment does not, however, moot FAIR's other challenges to it. *See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662, 113 S. Ct. 2297, 124 L.Ed.2d 586 (1993) (stating that a challenge to a statute is not moot when the new version of it "disadvantages [appellants] in the same fundamental way").

Amendment violates the First Amendment by impeding the law schools' rights of expressive association and by compelling them to assist in the expressive act of recruiting. Nonetheless, we explain briefly our conclusion that FAIR would prevail even under *O'Brien's* less strict framework.

1. Expressive Association

FAIR argues that the Solomon Amendment impairs law schools' First Amendment rights under the doctrine of expressive association. The Supreme Court most recently addressed this doctrine in *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L.Ed.2d 554 (2000). There the Court held that a state public accommodations law that prohibited discrimination based on sexual orientation could not constitutionally be invoked to force the Boy Scouts to accept openly gay James Dale as an assistant scoutmaster. *Id.* at 659, 120 S. Ct. 2446. Central to its analysis was the deference it gave to the Boy Scouts' "view of what would impair its expression," which compelled the Court's conclusion that Dale's presence would "significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'" *Id.* at 653, 120 S.Ct. 2446 (citation omitted).

Under *Dale*, the elements of an expressive association claim are (1) whether the group is an "expressive association," (2) whether the state action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the state's interest justifies the burden it imposes on the group's expressive association. *Id.* at 648-58, 120 S. Ct. 2446; *accord The Circle School v. Pappert*, 381 F.3d 172, 181-82 (3d Cir. 2004) (applying the *Dale* framework); *Pi Lambda Phi*

Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442 (3d Cir. 2000) (same). We apply each in turn to analyze FAIR's expressive association claim.

(a) *The law schools are expressive associations.*

A group that engages in some form of public or private expression above a de minimis threshold is an "expressive association." *Pi Lambda Phi*, 229 F.3d at 443. The group need not be an advocacy group or exist primarily for the purpose of expression. *Dale*, 530 U.S. at 648, 120 S. Ct. 2446. The Supreme Court held that the Boy Scouts, which "seeks to transmit . . . a system of values, engages in expressive activity." *Id.* at 650, 120 S. Ct. 2446.

"By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." *The Circle School*, 381 F.3d at 182. Because FAIR has shown that the law schools "possess[ ] clear educational philosophies, missions and goals," *id.*, we agree with the District Court's conclusion that they qualify as expressive associations. *FAIR*, 291 F. Supp. 2d at 303-04. Therefore, FAIR satisfies the first element of the *Dale* analysis.

(b) *The Solomon Amendment significantly affects the law schools' ability to express their viewpoint.*

FAIR argues that the Solomon Amendment significantly affects law schools' ability to express their viewpoint, reflected in their policies, that discrimination on the basis of sexual orientation is wrong. The Solomon Amendment compels them, they contend, to disseminate the opposite message. The schools believe that, by coordinating interviews and posting and publishing recruiting notices of an employer who

discriminates on the basis of sexual orientation, they impair their ability to teach an inclusive message by example. Put another way, FAIR maintains that the Solomon Amendment suppresses the law schools' chosen speech by interfering with their prerogative to shape the way they educate (including, of course, the manner in which they communicate their message).

In *Dale*, the Supreme Court recognized that "[t]he forced inclusion of an unwanted person in a group" could significantly affect the group's ability to advocate its public or private viewpoint. 530 U.S. at 648, 120 S. Ct. 2446. The viewpoint at issue in *Dale* was the Boy Scouts' long-held belief that "homosexual conduct is inconsistent with . . . the Scout Oath" and that "homosexuals [do not] provide a role model consistent with the[ ] expectations [of Scouting families]." *Id.* at 652, 120 S. Ct. 2446. Because the Boy Scouts' expressive purpose was to "inculcate [youth] with the Boy Scouts' values-both expressively and by example," *id.* at 649-50, 120 S. Ct. 2446, the organization believed that the presence of an openly gay assistant scoutmaster could be perceived as "promot[ing] homosexual conduct as a legitimate form of behavior," a message inconsistent with the expression it wished to convey and the example it wished to set. *Id.* at 651, 120 S. Ct. 2446.

The Supreme Court agreed. Because James Dale was openly gay, his "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653, 120 S. Ct. 2446.

Just as the Boy Scouts believed that "homosexual conduct is inconsistent with the Scout Oath," *id.* at 652, 120 S. Ct. 2446, the law schools believe that employ-

ment discrimination is inconsistent with their commitment to justice and fairness. Just as the Boy Scouts maintained that "homosexuals do not provide a role model consistent with the expectations of Scouting families," *id.*, the law schools maintain that military recruiters engaging in exclusionary hiring "do not provide a role model consistent with the expectations of," *id.*, their students and the legal community. Just as the Boy Scouts endeavored to "inculcate [youth] with the Boy Scouts' values-both expressively and by example," *id.* at 649-50, 120 S. Ct. 2446, the law schools endeavor to "inculcate" their students with their chosen values by expression and example in the promulgation and enforcement of their nondiscrimination policies. FAIR Br. at 22-25. And just as "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," *Dale*, 530 U.S. at 653, 120 S. Ct. 2446, the presence of military recruiters "would, at the very least, force the law schools to send a message," both to students and the legal community, that the law schools "accept" employment discrimination "as a legitimate form of behavior." *Id.*

Notwithstanding this compelling analogy, the District Court distinguished our case from *Dale* by suggesting there was a critical difference between the forced inclusion of a gay assistant scoutmaster and the forced presence of an "unwanted periodic visitor," the military recruiter, in the context of a larger recruiting effort. *FAIR*, 291 F. Supp. 2d at 304, 305. While there was "no question" that the gay scoutmaster would "undermine the Boy Scouts' ability to . . . inculcate its

values in younger members," the District Court wrote, the Solomon Amendment does not compel the law schools to accept the military recruiters as a "member" and does not "bestow upon them any semblance of authority." *Id.* at 305.

But our Court has recently held that compulsory accommodation of a government-prescribed message may violate schools' First Amendment expressive association rights, even when that message involves our most revered affirmations of American patriotism—the Pledge of Allegiance and our National Anthem, is only minimally intrusive and lacks the schools' imprimatur. *The Circle School*, 381 F.3d at 182 (holding that a statute requiring private schools to lead the Pledge of Allegiance and National Anthem violates their rights under the expressive association doctrine—"Certainly, the temporal duration of a burden on First Amendment rights is not determinative of whether there is a constitutional violation. . . . Similarly, the fact that the schools can issue a general disclaimer does not erase the First Amendment infringement at issue here, for the schools are still compelled to speak the [Government's] message."). If the Pledge and Anthem "only take[ ] a very short period of time each day," and may be preceded by "a general disclaimer regarding the recitation," yet do not "erase the First Amendment infringement at issue here," *id.*, then focusing on the periodic nature of the military recruiter's visits[11] is similarly unavailing.

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[11] Furthermore, the Solomon Amendment requires law schools to do more than passively accept the presence of an "unwanted periodic visitor." They must actively assist military recruiters in a manner equal in quality and scope to the assistance they provide other recruiters. 10 U.S.C. § 983(b)(1).

Moreover, the District Court's scrutiny of the law schools' belief that the presence of military recruiters will undermine their expressive message about fairness and social justice violates the *Dale* Court's instruction to "give deference to an association's view of what would impair its expression." 530 U.S. at 653, 120 S. Ct. 2446.[12] In *Dale*, the Court did more than pay lip service to deference notions. Deference distinguished the

[12] *Dale* may appear to depart from prior Supreme Court jurisprudence in this area. In two expressive association cases from the 1980s, the Court considered the claims of civic associations that state statutes forcing them to accept women as members violated their expressive association rights. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L.Ed.2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984). Closer review explains the distinction from *Dale*. In both cases the Court examined the organizations' expressive charitable and humanitarian purposes and determined that they would not be impaired by the forced inclusion of women members. *Duarte*, 481 U.S. at 548-49, 107 S. Ct. 1940; *Roberts*, 468 U.S. at 626-27, 104 S. Ct. 3244. The difference in outcome between these cases and *Dale*—the civic associations had to admit women, but the Boy Scouts did not have to admit *Dale*—underscores the significance of the Court's decision to extend "deference to an association's view of what would impair its expression." 530 U.S. at 653, 120 S. Ct. 2446.

Moreover, we note that the Supreme Court had previously extended deference to what an expressive association said would impair its expression. *E.g.*, *Meyer v. Grant*, 486 U.S. 414, 424, 108 S. Ct. 1886, 100 L.Ed.2d 425 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24, 101 S. Ct. 1010, 67 L.Ed.2d 82 (1981) ("[A] court[ ] may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.").

Supreme Court's conclusion on the impairment question from that of the New Jersey Supreme Court, which had decided the case previously. The state court had ruled in Dale's favor, holding that because the Boy Scouts have a policy of "discourag[ing] its leaders from disseminating *any* views on sexual issues," Dale's presence would not significantly affect its ability to disseminate its message. 530 U.S. at 654, 120 S. Ct. 2446 (citing *Dale v. Boy Scouts of America*, 160 N.J. 562, 734 A.2d 1196, 1223 (1999) (emphasis in original)). But faced with competing views-the Boy Scouts' view that *Dale's* presence impaired their message and the state court's view that it could not-the Supreme Court deferred to the Boy Scouts' view. In other words, the reason why there was "no question" (in the District Court's words in our case, 291 F. Supp. 2d at 305) that a gay scoutmaster would undermine the Boy Scouts' message was because the Boy Scouts *said it would*. *Dale*, 530 U.S. at 653, 120 S. Ct. 2446. In our case, FAIR has supplied written evidence of its belief that the Solomon Amendment's forcible inclusion of and assistance to military recruiters undermines their efforts to disseminate their chosen message of nondiscrimination. Accordingly, we must give *Dale* deference to this belief,[13] and conclude that FAIR likely

[13] Furthermore, the law schools are entitled to at least as much deference as the Boy Scouts, as the Supreme Court has recognized in other contexts that universities and law schools "occupy a special niche in our constitutional tradition," *Grutter v. Bollinger*, 539 U.S. 306, 329, 123 S. Ct. 2325, 156 L.Ed.2d 304 (2003), because of their "vital role in . . . democracy," *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L.Ed.2d 1311 (1957). The Court has acknowledged the importance of "autonomous decisionmaking by the academy." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12, 106 S. Ct. 507, 88 L.Ed.2d 523 (1985); *Sweezy*, 354

satisfies the second element of an expressive association claim.

(c) *Balancing of interests*

The third step in evaluating an expressive association claim is "balancing the First Amendment interests implicated by the Solomon Amendment with competing societal interests to determine whether the statute transgresses constitutional boundaries." *FAIR*, 291 F. Supp. 2d at 310.[14] We need not linger on this analysis. Rarely has government action been deemed so integral to the advancement of a compelling purpose as to justify the suppression or compulsion of speech. We presume that the Government has a compelling interest in attracting talented military lawyers.[15] But "[i]t is not

U.S. at 263, 77 S. Ct. 1203 (Frankfurter, J., concurring) (recognizing "four essential freedoms" of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study"). The Supreme Court's academic freedom jurisprudence thus underscores the importance of *Dale* deference in our case.

[14] The District Court rejected FAIR's argument that strict scrutiny applies because it did not believe that the Solomon Amendment directly burdens expressive association rights. *FAIR*, 291 F. Supp. 2d at 310-311. But because we concluded at step two that the Solomon Amendment impairs law schools' expression, strict scrutiny will apply. *Dale*, 530 U.S. at 659, 120 S. Ct. 2446 (rejecting the argument that only intermediate scrutiny should apply); *The Circle School*, 381 F.3d at 182 (applying strict scrutiny to statute impairing schools' expressive association rights by requiring them to lead the Pledge of Allegiance and National Anthem).

[15] Our colleague in dissent states that "[w]e do not write on a clean slate regarding the importance Congress places in access to college and university facilities by the military" and that "[w]e have already decided that issue contrary to the argument pressed by Appellants." In *United States v. City of Philadelphia*, 798 F.2d

enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989).

As we explain in the final section of our opinion, *infra* Part III.B.3(b), the Solomon Amendment could barely be tailored more broadly. Unlike a typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. And it may use sophisticated recruitment devices that are generally too expensive for use by civilian recruiters, such as television and radio advertisements. These methods do not require the assistance of law

81 (3d Cir. 1986), our Court acknowledged that "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *Id.* at 86. *City of Philadelphia*, however, is distinguishable from this case in two important respects. First, in that case the university invited the military recruiters on campus; the recruiters' presence was not effectively dictated by a statute, as is the case here. *Id.* at 83. Second, *City of Philadelphia* engaged in a conflict preemption analysis and held that, because it was not possible for the university to comply with both a Philadelphia anti-discrimination ordinance and the clear congressional policy concerning military recruitment on campus, the ordinance was preempted. *Id.* at 88-89. Our Court did not reach a balancing-of-interests inquiry. Therefore, neither this Court's prior acknowledgment of the importance Congress places on military recruiting on college and university campuses, nor our presumption in this case that there is an important governmental interest in attracting talented lawyers to the military, ends our analysis. Rather, we must go on to reach an issue that was not present in *City of Philadelphia*—whether the Solomon Amendment is narrowly tailored to achieve the Government's ends.

school space or personnel. And while they may be more costly, the Government has given us no reason to suspect that they are less effective than on-campus recruiting.

The availability of alternative, less speech-restrictive means of effective recruitment is sufficient to render the Solomon Amendment unconstitutional under strict scrutiny analysis. *Sable*, 492 U.S. at 126, 109 S. Ct. 2829; *The Circle School*, 381 F.3d at 182. But our path in this case is even clearer. The Government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal. And not only might other methods of recruitment yield acceptable results, they might actually fare better than the current system. In fact, it may plausibly be the case that the Solomon Amendment, which has generated much ill will toward the military on law school campuses,[16] actually impedes recruitment.[17]

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[16] See, *e.g.*, *FAIR*, 291 F. Supp. 2d at 282 (describing record evidence of student protests over military recruiting).

[17] The dissent, applying the balancing-of-interests test from *Roberts*, 468 U.S. at 620, 104 S. Ct. 3244, comes to the opposite conclusion—"that the law schools' interests here fall at the remote extreme of Justice Brennan's spectrum—'where that relationship's objective characteristics locate it . . . [near] the most attenuated of personal attachments.'" This balancing test, however, comes not from the portion of *Roberts* dealing with freedom of expressive association, but from the portion dealing with freedom of intimate association. The law schools are clearly not intimate associations, and where they may fall on the spectrum articulated by Justice Brennan for determining whether particular relationships merit protection under that doctrine is irrelevant to our analysis here. In *Roberts*, the Court went on to engage in a strict scrutiny expressive association analysis and applied the balancing test we apply here, determining that the Government had a compelling interest in eliminating discrimination and that the statute at issue was the least restrictive means of achieving that end. *Roberts*, 468 U.S. at 620, 104 S. Ct. 3244.

* * * * * *

FAIR likely satisfies the three elements of an expressive association claim. The law schools are expressive associations, they believe the message they choose to express is impaired by the Solomon Amendment, and no compelling governmental interest exists in the record to justify this impairment. Therefore, FAIR has a reasonable likelihood of success on the merits of its expressive association claim against the Solomon Amendment.

2. Compelled Speech

The Supreme Court has long recognized that, in addition to restricting suppression of speech, "the First Amendment may prevent the government from . . . compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S. Ct. 2334, 150 L.Ed.2d 438 (2001) (citing, *inter alia*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994).

Consistent with this principle, the Supreme Court has found impermissible compelled speech in three categories of government action. The first is government action that forces a private speaker to propagate a particular message chosen by a government. *See*

Barnette, 319 U.S. at 642, 63 S. Ct. 1178 (state could not enforce compulsory flag salute statute); *Wooley v. Maynard*, 430 U.S. 705, 717, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977) (state could not require drivers to display state motto on their license plates). The second is government action that forces a private speaker to accommodate or include another private speaker's message. *See Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 581, 115 S. Ct. 2338, 132 L.Ed.2d 487 (1995) (state nondiscrimination statute could not be constitutionally applied to require parade organizers to include a contingent of gay marchers behind their own banner); *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12-16, 106 S. Ct. 903, 89 L.Ed.2d 1 (1986) (state regulatory commission could not require public utility to distribute ratepayer-group's message in the extra space of the utility's billing statements); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974) (state could not force newspaper to provide equal editorial-page space to candidates it opposes). The third category is government action that forces an individual to subsidize or contribute to an organization that engages in speech that the individual opposes. *See United Foods*, 533 U.S. at 413, 121 S. Ct. 2334 (Congress could not require mushroom growers to pay assessments to fund advertisements to promote mushroom sales); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235, 97 S. Ct. 1782, 52 L.Ed.2d 261 (1977) (state could not compel non-union employees to pay union dues to promote union causes).[18] FAIR argues that the

[18] We note that the subsidization line of compelled speech case law is the only one of these three categories addressed by the dissent.

Solomon Amendment forces law schools to propagate, accommodate, and subsidize the military's recruiting, and therefore implicates each of the three varieties of compelled speech cases.

The District Court rejected FAIR's argument and held that the law schools are not compelled to express a particular ideological message by admitting and actively assisting the military recruiters. We disagree. As we explain in the analysis that follows, the military's recruiting is expressive of a message with which the law schools disagree. To comply with the Solomon Amendment, the law schools must affirmatively assist military recruiters in the same manner they assist other recruiters, which means they must propagate, accommodate, and subsidize the military's message. In so doing, the Solomon Amendment conditions funding on a basis that violates the law schools' First Amendment rights under the compelled speech doctrine.

(a) *Recruiting is expression.*

The expressive nature of recruiting is evident by the oral and written communication that recruiting entails: published and posted announcements of the recruiter's visit, published and oral descriptions of the employer and the jobs it is trying to fill,[19] and the oral communication of an employer's recruiting reception and one-on-one interviews. The expressive nature of recruiting is

[19] For example, most recruiters submit a National Association for Law Placement ("NALP") form that, as NALP puts it, "offers employers a thorough yet succinct way to tell their story to candidates" and includes a "narrative" section to "discuss the special characteristics" of the employer. NALP compiles these forms into a directory, which is distributed and/or made available by both law schools and employers to prospective employees.

also evident in its purpose—to convince prospective employees that an employer is worth working for. So understood, recruiting necessarily involves "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes"—the hallmarks of First Amendment expression. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980) (soliciting for charitable cause is expression entitled to First Amendment protection); *see also Thomas v. Collins*, 323 U.S. 516, 538, 65 S. Ct. 315, 89 L.Ed. 430 (1945) (recognizing First Amendment protection for the solicitation of union members).

The District Court held that recruiting is not expressive activity because it "differs dramatically" from other forms of expressive activity, such as soliciting contributions and proselytizing. While soliciting and proselytizing cannot be separated from the "concomitant advocacy of a particular case or viewpoint," the District Court reasoned, recruiting does not advocate any particular cause but only has "an economic or functional motive." *FAIR*, 291 F. Supp. 2d at 307-08.

We agree with the District Court that soliciting and proselytizing are obvious forms of expressive activity. We part, however, on the notion that efforts to raise a legal staff are "economic or functional" while efforts to raise funds and membership are not. Recruiting, soliciting and proselytizing are similarly economic and functional and, at the same time, similarly expressive. Recruiting conveys the message that "our organization is worth working for," while soliciting and proselytizing convey the similar functional message that "our charity is worth giving to" or "our cause is worth joining."

Having determined that recruiting is expressive, we now turn to the law schools' disagreement with that expression.

(b) *The law schools' disagreement with the speech of military recruiters.*

Military recruiters visiting law school campuses undoubtedly speak to students about the benefits of a career in the military, and the Solomon Amendment requires law schools to accept this speech. The law schools do not seem to take issue with most of the "expressions of value, opinion, or endorsement," *Hurley*, 515 U.S. at 573, 115 S. Ct. 2338, made by military recruiters on campus (to the extent recruiters suggest that military careers are honorable and rewarding experiences). Nor, for the most part, do military recruiters describing careers in the military make "statements of fact the [law schools] would rather avoid." *Id.*

The law schools' lack of objection to most of the speech they are forced to accept within their fora raises a key question under the compelled speech doctrine: to what extent must they disagree with the Government's message in order for strict scrutiny to apply? Justice Souter's dissent in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997), summarized the Court's jurisprudence to that time in suggesting that it is not necessary to show disagreement in order to sustain a compelled speech challenge.

> [T]he requirement of disagreement finds no legal warrant in our compelled-speech cases. In *Riley* [*v. Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L.Ed.2d 669 (1988)], for example, we held that the free-speech rights of

charitable solicitors were infringed by a law compelling statements of fact with which the objectors could not, and did not profess to, disagree. *See* 487 U.S., at 797-98, 108 S. Ct., at 2677-2678. *See also Hurley*, 515 U.S., at 573, 115 S. Ct., at 2347 ("[The] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . [.]"); *Barnette*, 319 U.S., at 635, 63 S. Ct., at 1183-1184 (if the Free Speech Clause bars the government from making the flag salute a legal duty, nonconformist beliefs are not required to exempt one from saluting). Indeed, the *Abood* cases themselves protect objecting employees from being forced to subsidize ideological union activities unrelated to collective bargaining, without any requirement that the objectors declare that they disagree with the positions espoused by the union. *See, e.g.*, [*Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-02, 106 S. Ct. 1066, 89 L.Ed.2d 232 (1986)]; *Abood*, 431 U.S., at 234, 97 S. Ct., at 1799. Requiring a profession of disagreement is likewise at odds with our holding two Terms ago that no articulable message is necessary for expression to be protected, *Hurley*, *supra*, at 569, 115 S. Ct., at 2345; protection of speech is not limited to clear-cut propositions subject to assent or contradiction, but covers a broader sphere of expressive preference . . . . . One need not "disagree" with an abstractionist when buying a canvas from a representational painter; one merely wishes to support a different act of expression.

Glickman, 521 U.S. at 488-89, 117 S. Ct. 2130 (Souter, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.).

Despite the numerous precedents to the contrary discussed by Justice Souter, it is possible to read the *Glickman* majority as implicitly endorsing a disagreement requirement in the compelled speech context. *Glickman* involved a First Amendment challenge to regulations requiring fruit growers, handlers, and processors to finance generic advertising of California nectarines, plums, and peaches. *Id.* at 460, 117 S. Ct. 2130. The majority "presume[d]" that the fruit growers, handlers, and processors "agree[d] with the central message of the speech that is generated by the generic [government] program [at issue]," and stated that "compelled speech case law" was "inapplicable" because the scheme at issue did not, *inter alia*, "require them to use their own property to convey an *antagonistic* ideological message," or "force them to respond to a *hostile* message when they would prefer to remain silent," *id.* at 470-71, 117 S. Ct. 2130 (citations and internal quotation marks omitted) (emphases added). However, because the degree of disagreement that may be required is minimal and in any event is present in this case, we need not determine whether such a requirement exists nor, if so, decipher its precise bounds.

As our dissenting colleague recently explained, the "individual's disagreement [in a compelled speech case] can be minor, as '[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.'" *Cochran v. Veneman*, 359 F.3d 263, 275 (3d Cir. 2004) (quoting *United Foods*, 533 U.S. at 411, 121 S. Ct. 2334). In *Cochran*, we held

unconstitutional a law requiring dairy producers to pay small assessments in support of "generic advertising that promotes milk." *Id.* Although the aggrieved dairy producers did not disapprove of the pro-milk message at issue, the ads featured milk "produced by methods they view[ed] as wasteful and harmful to the environment," and did not promote milk produced by their own favored methods. *Id.* The ads, in effect, served to promote milk produced by efforts with which the plaintiff dairy producers disagreed.

Here the law schools similarly object to conveying the message that all employers are equal, and instead would rather only open their fora and use their resources to support employers who, in their eyes, do not discriminate against gays. This objection constitutes as much of a protected First Amendment interest as the objection of the dairy farmers in *Cochran*. Moreover, there is at least one important sense in which the law schools strenuously disagree with the very words spoken by military recruiters that the Solomon Amendment compels them to accept and to which they have been forced to respond. 10 U.S.C. § 654(b) prohibits open, practicing gays from serving in the armed forces. Military recruiters undisputedly are bound by § 654(b), and do not recruit gay persons for service. Unsurprisingly, in light of § 654(b), the record demonstrates that openly gay persons who meet with military recruiters are told by the recruiters that they may not pursue military careers.[20] Such speech by military recruiters is perhaps the most discordant

[20] See JA107 (former ROTC student who had "wanted to be an officer in the JAG Corps since high school" interviewed with military recruiter, admitted his homosexuality, and was told that he was "ineligible due to his sexual orientation").

speech the Solomon Amendment compels the law schools to accept. Yet, as we have indicated, the act of being forced to accept speech promoting an employer whose discriminatory policies the law schools disagree with is sufficient "disagreement" to bring the Solomon Amendment within the Supreme Court's compelled speech jurisprudence.

Thus, unlike the regulatory scheme at issue in *Glickman*, the Solomon Amendment, by requiring law schools to open their fora to military recruiters when they would prefer to do so only for non-discriminating employers, "require[s] them to use their own property to convey an antagonistic ideological message." *Glickman*, 521 U.S. at 471, 117 S. Ct. 2130. Likewise, by directly providing "access" to campuses for speech by military recruiters where law students are told that openly gay applicants may not serve, the Solomon Amendment requires the law schools to allow an objectionable message counter to their beliefs. In addition, both forms of speech with which the law schools disagree have resulted in, according to the record, hundreds (if not thousands) of instances of responsive speech by members of the law school communities (administrators, faculty, and students), including various broadcast e-mails by law school administrators to their communities, posters in protest of military recruiter visits, and open fora held to "ameliorate" the effects of forced on-campus speech by military recruiters. All of these represent instances in which the schools were "force[d] . . . to respond to a hostile message when they would prefer to remain silent." *Id.* (internal quotation marks omitted). Therefore, the degree of the law schools' disagreement with the military recruiters' expression is sufficient to

warrant First Amendment protection. We now determine whether the Solomon Amendment compels the law schools to engage in that expression.

(c) *The law schools must propagate, accommodate, and subsidize the military's expressive message.*

Reasoning that the Solomon Amendment was not "an outright regulation on speech," the District Court held that the Supreme Court's compelled speech doctrine did not apply. *FAIR*, 291 F. Supp. 2d at 309. Put another way, the District Court concluded that the statute does not "directly requir[e] a private speaker to participate in the dissemination of a particular message." *Id.*

We disagree. Having concluded above that recruiting is expression, we believe that the Solomon Amendment compels the law schools to engage in that expression in all three proscribed ways: propagation, accommodation, and subsidy. The statute insists not only on access to campus for military recruiters, but the active and equal assistance of law schools' career services offices. For example, Harvard Law School's career services staff offers to assist employers to "get [their] message out to students in an effective manner." Like many law schools, the assistance Harvard provides includes coordinating interviews with students, counseling employers on effective recruiting, stuffing students' mailboxes with employers' information, scheduling social receptions for students, and printing employers' announcements in the School's newsletter. Under the express terms of the Solomon Amendment, law schools like Harvard must do the same for the military recruiters.

By requiring law schools to help military recruiters "get [their] message out to students" by distributing newsletters and posting notices, the Solomon Amendment compels law schools to propagate the military's message. Like the forced display of an unwanted motto on one's license plate, or the compulsory recitation of a pledge, this is compelled speech. *Wooley*, 430 U.S. at 717, 97 S. Ct. 1428; *Barnette*, 319 U.S. at 642, 63 S. Ct. 1178. By requiring schools to include military recruiters in the interviews and recruiting receptions the schools arrange, the Solomon Amendment compels the schools to accommodate the military's message in the recruiting-assistance programs they provide for other employers. Like the forced inclusion of a parade contingent, a statement in the extra space of a utility's billing statement, or a response in a newspaper's editorial page, this is compelled speech. *See Hurley*, 515 U.S. at 569-81, 115 S. Ct. 2338; *Pacific Gas*, 475 U.S. at 12-16, 106 S. Ct. 903; *Miami Herald*, 418 U.S. at 255-58, 94 S. Ct. 2831. And by putting demands on the law schools' employees and resources,[21] the schools are compelled to subsidize the military's recruiting message. Like mandatory assessments to support advertisements or political funds, this is compelled speech. *See United Foods*, 533 U.S. at 411-17, 121 S. Ct. 2334; *Abood*, 431 U.S. at 235, 97 S. Ct. 1782.

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[21] While we recognize that the relative cost of providing these services to one particular employer is marginal, the Supreme Court has never required that compelled subsidies be substantial to present a constitutional concern. *See, e.g., United Foods*, 533 U.S. at 408, 121 S. Ct. 2334 (mushroom assessment at issue was one cent per pound and only some of it was going toward the objectionable advertising).

(d) *The Solomon Amendment prohibits disclaimers and, even if it did not, risk of misattribution is not an element of a compelled speech violation.*

The District Court suggested that assisting military recruiters is not "obvious endorsement" by the law schools of the military's point of view because "law schools can effectively disclaim any recruiting message and can easily distance themselves ideologically from the military recruiters." *FAIR*, 291 F. Supp. 2d at 308, 310. But the Solomon Amendment, as recently amended, does not appear to permit law schools to disclaim the military's message. Its express terms require them to provide treatment to the military recruiters "equal in quality and scope" to that provided to other employers. As the law schools do not disclaim the messages of those employers, similarly they may not disclaim the message of the military. Furthermore, it was in apparent response to the law schools' ameliorative measures-their efforts to "distance themselves" (in the District Court's words) from the military's position-that the DOD and eventually Congress insisted on equal treatment for military recruiters.

But even if the Solomon Amendment allowed for disclaimers, the Supreme Court has never held that compelled speech concerns evaporate if a speaker can ameliorate the risk of misattribution by disclaiming the message it is being compelled to propagate. To the contrary, "the presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure . . . to respond to [compelled] speech." *Pacific Gas*, 475 U.S. at 15 n. 11, 106 S. Ct. 903 (plurality opinion). While a disclaimer reduces the risk that readers will misattribute the message, it "does nothing to reduce the risk that [the compelled speaker] will be forced to respond

when there is strong disagreement with the substance of [the] message." *Id.* Thus, in *Pacific Gas*, the Supreme Court invalidated as compelled speech a requirement that a utility share the extra space in its billing statements with an organization that opposed its viewpoint. The utility's ability to include a disclaimer did not change the analysis. In fact, a "forced reply" may add to the injury of compelled speech, not its cure. *Id.* at 15-16, 106 S. Ct. 903 (noting that the "pressure to respond" to compelled speech is "antithetical to the free discussion that the First Amendment seeks to foster").

In *Miami Herald*, the Supreme Court also invalidated a state law compelling newspapers to provide editorial page space to any political candidates that the newspaper assailed in an editorial. 418 U.S. at 255-58, 94 S. Ct. 2831. It did not suggest that a newspaper could alleviate compelled speech by running a disclaimer above the candidate's message.[22]

Similarly, in *Wooley* the Court held that the state motto on the Maynards' license plate was compelled speech even though the state supreme court had expressly found in another case that "nothing in the state law . . . precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates." 430

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[22] While the newspapers could avoid triggering the penalty of having to provide editorial page space to assailed candidates by not criticizing any candidates at all, the Court noted that this self-censorship was a form of speech suppression, itself a First Amendment injury. 418 U.S. at 257, 94 S. Ct. 2831. Our case presents this self-censorship concern as well, as the law schools could avoid triggering-or at least minimize-the quality and scope of active assistance they must provide to military recruiters by limiting the quality and scope of their assistance to other recruiters.

U.S. at 722, 97 S. Ct. 1428 (Rehnquist, J., dissenting) (citing *State v. Hoskin*, 112 N.H. 332, 295 A.2d 454 (1972)).[23] On the facts of *Wooley*, there was virtually no

[23] The Supreme Court has expressed concerns about misattribution and ability to disclaim in several of its compelled speech cases. *See Hurley*, 515 U.S. at 576-77, 115 S. Ct. 2338 (noting that parade organizers do not customarily "disavow 'any identity of viewpoint' between themselves and the selected participants" and that "such disclaimers would be quite curious in a moving parade"); *Turner Broadcasting System v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994) ("TBS") (noting that regulations requiring cable operators to carry broadcast signals posed little risk of misattribution because broadcasters are required by federal regulation to identify themselves at least once every hour); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980) (suggesting that there was no risk that the message of students distributing political pamphlets and conducting a petition drive at a shopping mall would be attributed incorrectly to the mall owner and noting that the mall owner could disavow any connection with the message by posting signs near the petition table).

But in none of these cases did the Court hold that the risk of misattribution and the speaker's ability to disclaim the message were dispositive elements of the compelled speech doctrine. In *Hurley*, the Court noted that it was not "deciding on the precise significance of the likelihood of misattribution" and did not rest its holding on the parade organizer's presumed difficulty in disclaiming the gay marchers' message. 515 U.S. at 517, 115 S. Ct. 2310. And in both *PruneYard* and *TBS* the absence of a risk of misattribution was only one of a number of factors distinguishing them from prior cases in which compelled speech had been found. *PruneYard*, 447 U.S. at 87, 100 S. Ct. 2035; *TBS*, 512 U.S. at 654-55, 114 S. Ct. 2445. The Court also considered the content-neutral nature of the law causing the challenged "compelled" speech, the nonexistent risk of self-censorship, and the unique characteristics of the forum (the Court later described the shopping mall in *PruneYard* as a "peculiarly public" forum, *see Pacific Gas*, 475 U.S. at 13 n. 8, 106 S. Ct. 903; the *TBS* Court noted cable's monopoly status and exclusive control over the "essential pathway" for

risk that the compelled speech would be attributed to anyone other than the state.

In sum, law schools are expressly precluded from disclaiming or retorting the military's recruiting message by the Solomon Amendment's new requirement that their treatment of military recruiters be "equal in quality and scope" to the treatment of other recruiters. And while the Court has mentioned the danger of misattribution and the speaker's ability to disclaim in several of its compelled speech cases, it has not held to date that the presence of either factor eliminated compelled speech concerns. Therefore, the District Court was wrong to reject FAIR's compelled speech claims on the basis of its conclusion that the Solomon Amendment's requirements posed little risk of misattribution to the law schools who in any event could effectively disclaim the military's message.

(e) *The Solomon Amendment would not likely survive strict scrutiny.*

Although the Solomon Amendment impairs the law schools' First Amendment rights by compelling them to propagate, accommodate, and subsidize the military's recruiting message against their will, the statute "could still be valid if it were a narrowly tailored means of

disseminating a particular type of communication). *TBS*, 512 U.S. at 654-56, 114 S. Ct. 2445; *PruneYard*, 447 U.S. at 87-88, 100 S. Ct. 2035. And while *PruneYard* comes closest to holding that a speaker's ability to disclaim a message may be relevant to the compelled speech analysis, it is notable that *PruneYard* predated *Pacific Gas*, the most express rejection of the ability to disclaim as an antidote for compelled speech. *Pacific Gas*, 475 U.S. at 15 n. 11, 106 S. Ct. 903 (plurality opinion) ("The presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure on the appellant to respond to [the unwanted] speech. . . .").

serving a compelling state interest"-*i.e.*, if it passed strict First Amendment scrutiny. *Pacific Gas*, 475 U.S. at 19, 106 S. Ct. 903; *see also Riley*, 487 U.S. at 798, 108 S. Ct. 2667 (regulation impairing speakers' First Amendment rights under the compelled speech doctrine was subject to "exacting First Amendment scrutiny" that it did not survive). We thus inquire (1) whether the Government's interest in recruiting military lawyers is compelling, and (2) whether the Solomon Amendment is narrowly tailored to advance that goal. But as discussed above in the context of FAIR's expressive association claim, *see supra* Part III.B.1(c), the Solomon Amendment does not survive strict scrutiny because the Government has not demonstrated (or even argued) that it cannot recruit effectively by less speech-restrictive means. Therefore, the balance of interests likely tips in the law schools' favor.

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To summarize, the Solomon Amendment conditions funding on the law schools' propagation, accommodation, and subsidy of the military's recruiting, which is expression. The Government has not shown that the assistance from law schools that the Solomon Amendment requires is narrowly tailored to advance its interest in recruiting. FAIR has thus established a reasonable likelihood of establishing that the Solomon Amendment unconstitutionally conditions funding on a basis that infringes law schools' constitutionally protected interests under the First Amendment doctrine of compelled speech.

3. Consideration of *O'Brien*

We turn finally to an argument that is ancillary to our holding. Although the Solomon Amendment fits within the categories of First Amendment cases described in the previous sections, the District Court placed it instead into a mold it does not fit: the doctrine of expressive conduct. In so doing, it applied the intermediate scrutiny test set out by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968), discussed at length below, for review of governmental regulations with only an incidental effect on expression. For the sake of completeness, we close by considering whether the law schools' resistance to the military's recruitment policy, motivated by their ideological opposition to exclusion based on sexual orientation, is expressive conduct protected by the First Amendment.[24]

(a) O'Brien *is inapplicable when First Amendment activity is protected on other grounds.*

Before exploring the contours of the *O'Brien* test, we explain briefly why expressive conduct fails as a descriptive model of the First Amendment issues at

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[24] While the expressive content of the law schools' message is relevant also to the law schools' expressive association claim under *Dale*, the analysis is different in that context. Under the rubric of expressive association, we consider whether the Solomon Amendment interferes with the law schools' extant message of nondiscrimination, and thus impinges their associational freedom, by compelling them to assist in the military's recruitment efforts. But with expressive conduct we ask whether resistance to the statute, *i.e.*, exclusion of the recruiters in contravention of the statute (or its flip side, "the conduct of law schools in permitting or assisting a recruiting activity," *FAIR*, 291 F. Supp. 2d at 309), is *itself* expressive conduct warranting First Amendment protection.

stake in this case. Activity simultaneously may give rise to an expressive conduct claim and to claims based on alternative theories. The premise of the category "expressive conduct" is that some activity, though it is not speech proper and is not protected under other First Amendment grounds, is crucial to public debate and warrants protection. *See Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L.Ed.2d 342 (1989) (explaining that the Court has "long recognized that [the First Amendment's] protection does not end at the spoken or written word" and that conduct may be "sufficiently imbued with elements of communication" to merit First Amendment protection) (citations omitted). Expressive conduct is, loosely stated, an overflow category; it is broad.[25] It is therefore unsurprising that much expression that falls squarely within the doctrines discussed in the first sections may also be cast as expressive conduct. In those cases, application of the *O'Brien* test is inappropriate.

We need only look at the seminal expressive association and compelled speech cases to see that this is so. In *Dale*, for example, the Supreme Court expressly declined to rely on *O'Brien*, explaining: "New Jersey's

[25] As noted in *Johnson*, *id.*, the Supreme Court has recognized the expressive nature of students' wearing of black armbands to protest the war in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969); of a sit-in by black citizens in a segregated area, *Brown v. Louisiana*, 383 U.S. 131, 141-142, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58, 90 S. Ct. 1555, 26 L.Ed.2d 44 (1970); and of picketing in support of a wide variety of causes, *see, e.g., Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-314, 88 S. Ct. 1601, 20 L.Ed.2d 603 (1968).

public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable." 530 U.S. at 659, 120 S. Ct. 2446. Likewise in *Wooley v. Maynard*, the Supreme Court elected not to consider *O'Brien* because it considered compelled speech to be a "more appropriate First Amendment ground[ ]." 430 U.S. at 713, 97 S. Ct. 1428. In short, the Court has not applied *O'Brien* where alternative First Amendment grounds were available.

Taking our cue from the Supreme Court, because the Solomon Amendment is subject to strict scrutiny under the doctrines of expressive association and compelled speech, we need not engage in an *O'Brien* analysis. Because *O'Brien* scrutiny is intermediate rather than strict, demonstrating a constitutional violation under a theory of expressive conduct is significantly more burdensome than under the models we have discussed. And the law schools need establish only one constitutional infirmity to justify an injunction. *See, e.g., Sys. Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1144 (3d Cir. 1977).

(b) *Even under* O'Brien, *the Solomon Amendment is likely to impair expressive conduct unconstitutionally.*

Even if *O'Brien* applied, we would reverse the District Court's decision because we disagree with its application of intermediate scrutiny. Notwithstanding that the District Court's opinion featured a consistent theme-that the Solomon Amendment "targets conduct, not speech"-the Court acknowledged a communicative or expressive element in the law schools' policies against offering the schools' resources, support, or endorsement to any employer who does not conform to

their antidiscrimination policies. *FAIR*, 291 F. Supp. 2d at 311. Thus, to the extent we focus on the law schools' conduct, it is nonetheless expressive.

The First Amendment protects the right to engage in expressive conduct. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982) (recognizing the right of boycotters to "band[ ] together and collectively express[ ] their dissatisfaction with a social structure that had denied them rights to equal treatment and respect"); *Spence v. Washington*, 418 U.S. 405, 411, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974) (acknowledging First Amendment protection for conduct that "convey[s] a particularized message" that is understood as expression in the context of surrounding circumstances). A government regulation impairing expressive conduct is only justified "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S. Ct. 1673.

We take no issue with the District Court's conclusion that the Solomon Amendment is within the constitutional power of the Government, as the Constitution authorizes Congress to raise and support a military. *FAIR*, 291 F. Supp. 2d at 312 (citing U.S. Const. art. 1 § 8). We assume *arguendo* that the District Court was correct in determining that the Solomon Amendment is unrelated to the suppression of ideas. *Id.* at 314. And we of course presume that the United States has a vital interest in having a system for acquiring talented military lawyers. But as we noted above, the Government has chosen to submit no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting. Instead, the Government argues that "the impact of the wholesale exclusion of military recruiters [from law school campuses] is self-evident, and the government is not obligated" during preliminary injunction proceedings "to assemble and present a factual record that merely confirms the dictates of common sense." The Government fails to offer even an affidavit indicating that enforcement of the Solomon Amendment has enhanced military recruiting efforts. It suggests simply that the scope of the remedy sought by the plaintiffs relieves the Government of its obligation, pursuant to the First Amendment, to justify its curtailment of expression. How this is so we cannot conjure. We are unaware of any case so holding.[26] And while the Government emphasizes that the Nation's military is at stake, invoking the importance of a well-trained military is not a substitute for demonstrating that there is an important governmental interest in opening the law schools to military recruiting. *See Rostker v. Goldberg*, 453 U.S. 57, 89, 101 S. Ct. 2646, 69 L.Ed.2d 478 (1981) ("'[T]he phrase "war power" cannot be invoked as a talismanic incantation to . . . remove constitutional limitations safeguarding essential liberties.'"

[26] The Government quotes *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378, 120 S. Ct. 897, 145 L.Ed.2d 886 (2000), for the proposition that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." But this is not a case where the Government has presented less evidence than might otherwise be required; here the Government has presented no evidence.

(quoting *United States v. Robel*, 389 U.S. 258, 263-64, 88 S. Ct. 419, 19 L.Ed.2d 508 (1967))).[27]

It may be the case, as the Government argues, that on-campus recruitment is an employer's principal tool for attracting talented students. But it does not thereby follow that recruiting by means of the Solomon Amendment is effective. On the contrary, it seems to us equally plausible that the Solomon Amendment has in fact hampered recruitment by subjecting the military's exclusionary policy to public scrutiny. The record is replete with references to student protests and public condemnation. In this context, it is hardly "common sense," as the military alleges, that its presence on campus amidst such commotion and opposition has aided its recruitment efforts.

In closing, we emphasize again that we need not enter the thicket of *O'Brien* analysis in this case. We rely on the doctrines of expressive association and compelled speech to conclude that FAIR has made the requisite showing of a likelihood of success on the merits in support of its motion for a preliminary injunction. And even under the intermediate scrutiny test of *O'Brien* the Solomon Amendment falters thus far, for the Government has chosen not to produce any evidence that it is no more than necessary to further the Government's interest. Perhaps this explains why the DOD initially objected to the Amendment as "un-

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[27] We note that this is not a case involving military discretion to determine whether internal policies are necessary and appropriate. *Cf. Parker v. Levy*, 417 U.S. 733, 743, 94 S. Ct. 2547, 41 L.Ed.2d 439 (1974) ("[T]he military is, by necessity, a specialized society separate from civilian society" (citation omitted)). On the contrary, this case involves the military's compelled presence on the campuses of civilian institutions.

necessary" and "duplicative." 140 Cong. Rec. H3864 (daily ed. May 23, 1994).

C. Other preliminary injunction factors

By establishing a likelihood of success on the merits of its unconstitutional condition claim based on a First Amendment violation, FAIR has necessarily satisfied the second element: irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999) ("[T]he irreparable injury issue and the likelihood of success issue overlap almost entirely" in the First Amendment context). On the third element, we conclude that the balance of interest tips in FAIR's favor. Without an injunction, the law schools' First Amendment rights under the expressive association doctrine and the compelled speech doctrine will be impaired during on-campus recruiting seasons. The Government, on the other hand, does not lose the opportunity, in a proceeding on the merits, to "shoulder its full constitutional burden of proof" of showing that a less restrictive alternative would not be as effective. *Ashcroft v. ACLU*, — U.S. ——, 124 S. Ct. 2783, 2794, 159 L.Ed.2d 690 (2004). As for the final element, we believe the public is best served by enjoining a statute that unconstitutionally impairs First Amendment rights.

IV. Conclusion

The Solomon Amendment requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom. While no

doubt military lawyers are critical to the efficient operation of the armed forces, mere incantation of the need for legal talent cannot override a clear First Amendment impairment. Even were the test less rigorous than a compelling governmental riposte to the schools' rights under the First Amendment, failure nonetheless is foreordained at this stage, for the military fails to provide any evidence that its restrictions on speech are no more than required to further its interest in attracting good legal counsel.

In this context, the Solomon Amendment cannot condition federal funding on law schools' compliance with it. *FAIR* has a reasonable likelihood of success on the merits and satisfies the other injunctive elements as well. We reverse and remand for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment.

ALDISERT, Circuit Judge, Dissenting.

I would affirm the judgment of the district court. Although I have myriad problems with the fundamental contentions presented by the Appellants and the host of supporting amicus curiae briefs, essentially my disagreement is with the all-pervasive approach that this is a case of First Amendment protection in the nude. It is not.

Rather, the issues before us are threefold. First, we must inquire whether Appellants have met the high burden of overcoming the presumption of constitutionality of a congressional statute that is not only bottomed on the Spending Clause, but on a number of other specific provisions in the Constitution that deal with Congress' obligation to support the military. This

is especially relevant because, in the entire history of the United States, no court heretofore has ever declared unconstitutional on First Amendment grounds any congressional statute specifically designed to support the military.

Second, we must determine, using canons of logic, whether a permissible factual inference-let alone a compellable one-may be properly drawn that the law schools' anti-discrimination policies are violated from the sole evidentiary datum that a military recruiter appears on campus for a short time.

Third, only if a proper inference may be drawn do we meet First Amendment considerations. The First Amendment is implicated if and only if, after applying the "balance-of-interests" test originally articulated by Justice Brennan in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984), it can be concluded that the operation of the First Amendment trumps the several clauses of Articles I and II relating to the spending power and support of the military.

Upon analysis, the argument of the Appellants and many of the amici curiae, including but not limited to the Association of American Law Schools, is rather complex. Its point of beginning takes the following tripartite form: (1) most, but not all, accredited American law schools have adopted policies that indicate they will not discriminate based on age, race, color, national origin, disability, religion, gender or sexual orientation; (2) the law schools have committed themselves to "admit students, grant scholarships, grade exams, recruit and promote faculty, and hire staff in light of these principles" (J.A. at 509); (3) in conjunction with their own commitment not to discriminate, the law

schools have adopted policies stating that they will not assist employers who discriminate.

Their intermediate statement is that the United States military excludes service members based on evidence of homosexual conduct or orientation. *See* 10 U.S.C. § 654 (2004). From this, the law schools conclude that permitting the military to recruit on campus for military lawyers and military judges creates a compellable inference that the law schools are violating their own policies prohibiting discrimination on the basis of sexual orientation.

They then move to the Solomon Amendment which provides that certain federal grants will not be made to "an institution of higher education . . . if the Secretary of Defense determines that that institution . . . has a policy or practice . . . that either prohibits, or in effect prevents—(1) the Secretary of a military department or [the Department of Homeland Security] from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting . . . ."[28] 10 U.S.C. § 983.

This year, Congress amended the Solomon Amendment to require military recruiting access "in a manner that is at least equal in quality and scope to the [degree

[28] Congress has clarified that the funding restriction does not apply to the following: (1) federal grants of funds "to be available solely for student financial assistance or related administrative costs," Pub. L. No. 106-79, § 8120, 113 Stat. 1260 (Oct. 25, 1999); (2) an institution that ceased its prior policy or practice of prohibiting or effectively preventing entry to campus or access to students on campus for military recruiting, 10 U.S.C. § 983(c)(1); and (3) an institution that "has a longstanding policy of pacifism based on historical religious affiliation," 10 U.S.C. § 983(c)(2).

of] access to campuses and to students that is provided to any other employer." National Defense Authorization Bill for Fiscal Year 2005, Pub.L. No. 108-287 (2004).

From the foregoing premises Appellants' Second Amended Complaint alleges that the Solomon Amendment and regulations promulgated thereunder violate the First Amendment as applied to law schools by: (1) imposing unconstitutional conditions on the receipt of federal funding; (2) effecting viewpoint discrimination; (3) forcing the plaintiffs to endorse messages repugnant to them and suppressing their expression of dissent; and (4) imposing vague and overbroad restrictions on speech.

I would hold that Congress' use of the spending power and fulfillment of the requirements to maintain the military under Articles I and II do not unreasonably burden speech and, therefore, do not offend the First Amendment. I apply the balance-of-interests test and decide that the interest of protecting the national security of the United States outweighs the indirect and attenuated interest in the law schools' speech, expressive association and academic freedom rights. The Solomon Amendment survives the constitutional attack because its provisions, the 2004 amendments thereto and related regulations, govern conduct while only incidentally affecting speech. In serving its compelling interest in recruiting military lawyers, the statute does not require the government to engage in unconstitutional conduct. Accordingly, with respect, I dissent. I agree with the thoughtful statement of reasons of the district court and would affirm its judgment.

I.

The starting point for analysis must be fealty to the precept that congressional statutes are presumed to be constitutional. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988) ("'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L.Ed. 297 (1895)); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 99 S. Ct. 1313, 59 L.Ed.2d 533 (1979) ("[A]n act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). Thus in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991), the Court teaches:

> The principle enunciated in *Hooper v. California*, *supra* and subsequent cases, is a categorical one: As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which would save the Act. *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (opinion of Holmes, J.). This principle is based at least in part on the fact that a decision to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Ibid.* Following *Hooper*, *supra*, cases such as *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909), and *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L.Ed. 1061 (1916), developed the corollary doctrine that

> "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations. *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-307, 44 S.Ct. 336, 68 L.Ed. 696 (1924). It is qualified by the proposition that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S. Ct. 620, 77 L.Ed. 1265 (1933).

Id. at 190-191, 111 S. Ct. 1759.

It is noted that although the Supreme Court considers this principle "a categorical one," it is not included in the majority's analysis.

II.

A second disagreement with the approach of my distinguished brothers of the majority is that they have not identified by name or discussed the several important provisions of the Constitution that provide for the support of the military and that antedate the promulgation of the amendments contained in the Bill of Rights.

Among the powers granted to Congress is the spending power: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." U.S. Const. art. I, § 8, cl. 1. Furthermore, Congress is specifically given several powers related to the military: (1) "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land

and Water," *id.* cl. 11; (2) "[t]o raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years," *id.* cl. 12; (3) "[t]o provide and maintain a Navy," *id.* cl. 13; and (4) "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14.

The Constitution also authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* cl. 18. The Constitution further states: "[t]he President shall be Commander in Chief of the Army and Navy of the United States. . . ." Const. art. II, § 2, cl. 1. The President also "shall take Care that the Laws be faithfully executed. . . ." *Id.* § 3, cl. 1.

Indeed, the only oblique reference to these countervailing provisions of the Constitution appears in the majority's discussion of the unconstitutional conditions doctrine, citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995) (public university could not condition funds for student publications on their secular perspective); *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (FCC could not condition federal funds to radio stations on editorial content); and *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972) (relating to nonrenewal of a contract and citing cases relating to denials of tax exemptions and welfare payments, but emphasizing that "most often, we have applied the principle to denials of public employment").

Significantly, my research has not discovered any reported case where an act of Congress exclusively predicated on supporting the military has been declared unconstitutional by application of the seminal doctrine that "[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Speiser v. Randall*, 357 U.S. 513, 526-529, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958); *see also Perry*, 408 U.S. at 597, 92 S. Ct. 2694. By reversing the district court's judgment, the majority has created new law, totally unsupported by binding precedent. In doing so the majority selects analogues to cases where state public accommodation statutes were involved and not a single case where an act of Congress was not only authorized by various Clauses in Articles I and II, but commanded by them.

In the posture of this case, Appellants do not urge that the Solomon Amendment is facially unconstitutional, but only that it is unconstitutional as applied to the law schools because it offends their stated policies of anti-discrimination. To succeed in their burden of overcoming the presumption of constitutionality of the Solomon Amendment, they must first demonstrate that the mere presence of recruiting officers on campus constitutes a compellable inference that the law schools will be objectively and reasonably viewed as violating their anti-discrimination policies. If they succeed at that stage, then they must demonstrate that the bite of the First Amendment under the facts of this case is so strong as to outweigh Congress' interests to "provide for the common Defense . . . ," U.S. Const. art. I, § 8, cl. 1; "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on

Land and Water," *id.* cl. 11; "raise and support Armies," *id.* cl. 12; "provide and maintain a Navy," *id.* cl. 13; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; and for the President to "be Commander in Chief of the Army and Navy of the United States . . . ," U.S. Const. art. II, § 2, cl. 1; and to "take Care that Laws be faithfully executed . . . ," *id.* § 3, cl. 1.

Before proceeding into this analysis, it bears note that the military's policy against homosexual activity, codified at 10 U.S.C. § 654, previously has been adjudged by a number of our sister courts of appeals not to violate the Constitution. *See, e.g., Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996) ("We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in [10 U.S.C.] § 654(f)(3)(A).").

Moreover, in *United States v. City of Phil.*, 798 F.2d 81 (3d Cir. 1986) this court has discussed the very subject of this appeal. In that case, the Temple School of Law's placement office invited the Judge Advocate General Corps of the Army, Navy and Marine Corps to participate in a job recruiting program on its campus. The Philadelphia Commission on Human Relations issued an order restraining the law school from doing so on the ground that the military services did not accept homosexuals. We affirmed a district court order prohibiting the Commission from taking any adverse action. After reviewing Congressional legislation implementing what we described as "the long standing Congressional policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters," we stated:

> We believe that only one reasonable conclusion can be drawn from this legislation: Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance. In other words, we think that Congress views such access an integral part of the military's effort to conduct "intensive recruiting campaigns to obtain enlistments." This conclusion is buttressed by the legislative history of these provisions. For example, a committee report accompanying the DDA Act of 1973 states, in pertinent part, that "the Committee believes that [the] national interest is best served by colleges and universities which provide for the full spectrum of opportunity for various career fields, including the military field through the Reserve Officers Training Corps program, and by the opportunity for students to talk to all recruiting sources, including military recruiters." H.R. Rep No. 92-1149, 92d Cong., 2d Sess. 79 (1972). . . .
>
> We conclude, therefore, that the Order conflicts with a clearly discernible Congressional policy concerning military recruitment on the campuses of this nation's colleges and universities.

Id. at 86, 88. We do not write on a clean slate regarding the importance Congress places in access to college and university facilities by the military. We already have decided that issue contrary to the argument pressed by the Appellants. And we made this determination almost twenty years ago.

III.

Before we address the application of First Amendment precepts, I am unwilling to accept that there is a

permissible inference, let alone a compellable one, that a military presence on campus to recruit, in and of itself, conjures up an immediate impression of a discriminatory institution. Throughout our history, especially in times of war, like the present conflicts in Afghanistan and Iraq, and the military campaign against the Al Qaeda, a completely different impression is evoked. The men and women in uniform are almost universally considered as heroes, sacrificing not only their lives and well-being, but living separate from all the comforts of stateside living. Again in the current era, almost every day, a candidate for President emphasized his four months as a swift boat commander in the Vietnam conflict. As masters of public opinion, the political apparatus on both sides of the aisle certainly would not put a premium on military service if the inference of the discrimination advanced by Appellants here was attached thereto. Indeed, the respect to the man and woman in uniform is so profound that in the same Presidential campaign, the other candidate was criticized for serving at home in a National Guard unit during the Vietnam conflict instead of going overseas.

This view of service in the armed forces is at the farthest polar extreme from the Appellants' position that the mere presence of military recruiters conjures up the image of an institution that discriminates. That the military does so in fact, does not, in and of itself, generate the direct and universal feeling of loathing and abomination to the extent that their presence on campus a few days a year deprives law school institutions of rights inferred from the First Amendment.

What is involved here in the first instance is not operation of legal principles but precepts of logic that

determine what can be properly inferred from stated circumstances. An inference is a process in which one proposition (a factual conclusion) is arrived at and affirmed on the basis of one or more other propositions, which were accepted as the starting point of the process. Professor Stebbing observes that an inference "may be defined as a mental process in which a thinker passes from the apprehension of something given, the datum, to something, the conclusion, related in a certain way to the datum, and accepted only because the datum has been accepted." L.S. Stebbing, *A Modern Introduction to Logic* 211-212 (1948).

Inference is a process where the thinker passes from one proposition to another that is connected with the former in some way. But for the passage to be valid, it must be made according to the laws of logic that permit a reasonable movement from one proposition to another. Inference, then is "any passing from knowledge to new knowledge." Joseph Gerard Brennan, *A Handbook of Logic* 1 (1957). The passage cannot be mere speculation, intuition or guessing. The key to a logical inference is the reasonable probability that the conclusion flows from the evidentiary datum because of past experiences in human affairs. A moment is necessary to discuss the difference between *inference* and *implication*. These terms are obverse sides of the same coin. We *infer* a conclusion from the data; the data *imply* a conclusion. Professor Cooley explains:

> [w]hen a series of statements is an instance of a valid form of inference, the conclusion will be said to *follow* from the premises, and the premises to *imply* the conclusion. If a set of premises implies a conclusion, then, whenever the premises are accepted

> as true, the conclusion must be accepted as true also. . . .

John C. Cooley, *A Primer of Formal Logic* 13 (1942).

As Professor Brennan put it: "In ordinary discourse, [implication] may mean 'to give a hint,' and [inference], 'to take a hint.'" Brennan, *A Handbook of Logic* at 2-3. Drawing a proper inference is critical in this case, and this court has heretofore suggested some broad guidelines:

> The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncracies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts. As the Supreme Court has stated, "The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Tose v. First. Pa. Bank, N.A., 648 F.2d 879, 895 (3d Cir. 1981) (quoting *Galloway v. United States*, 319 U.S. 372, 395, 63 S. Ct. 1077, 87 L.Ed. 1458 (1943)).

From these basic precepts of logic we cannot conclude that the mere presence of a uniformed military recruiter permits or compels the inference that a law school's anti-discrimination policy is violated. It bears repetition that the passage from datum to conclusion cannot be mere speculation, intuition, or guessing, or by

"judicial idiosyncracies." The subjective idiosyncratic impressions of *some* law students, *some* professors, or *some* anti-war protesters are not the test. What we know as men and women we cannot forget as judges. And this we know from elementary canons of logical processes-the validity *vel non* of a logical inference is the *reasonable* probability that the conclusion flows from the evidentiary datum because of past experiences in human affairs.

A participant in a military operation cannot be *ipso facto* denigrated as a member of a discriminatory institution. And conjuring up such an image is the cornerstone of Appellant's First Amendment argument.

In my view it is not necessary to meet any First Amendment argument because given the evidentiary datum of a military recruiter on campus for a few days, a proper inference may not be drawn that this, in and of itself, supports a factual conclusion that the law school is violating its anti-discrimination policy. I think that this alone is sufficient to affirm the judgment of the district court.

Nevertheless, I go further and assume that Appellants' suggested inference may properly be drawn as a fact, and now turn to a discussion of whether First Amendment concerns trump the demands placed on Congress and the President under Articles I and II to support the military.

IV.

Our beginning point in approaching a First Amendment analysis is the balancing-of-interests test set forth in Justice Brennan's important opinion in *Roberts*:

> Determining the limits of state authorities over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's *objective* characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. . . . We need not mark the potentially significant points on this terrain with any precision.

468 U.S. at 620, 104 S. Ct. 3244 (emphasis added). Moreover, important for our immediate purposes is the recognition that "[t]he right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623, 104 S. Ct. 3244.

Although dealing with distinctions between abortions and other procedures, Justice Blackmun emphasized that in constitutional matters we do not deal with absolutes. "The constitutionality of such distinction will depend on its degree and the justification for it." *Bellotti v. Baird*, 428 U.S. 132, 149-150, 96 S. Ct. 2857, 49 L.Ed.2d 844 (1976). For other cases discussing the necessity to weigh or balance conflicting interests, *see also New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L.Ed.2d 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L.Ed.2d 474 (1987); *Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749, 758, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985) ("We have long recognized that not all speech is of equal First Amendment importance."); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978); *Maher v. Roe*, 432 U.S. 464, 473, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977); *Whalen v. Roe*, 429 U.S. 589, 599, 600 and nn. 24 and 26, 97 S. Ct. 869, 51 L.Ed.2d 64 (1977); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L.Ed.2d 965 (1977) (emphasizing that a line has to be drawn between media reports that are protected and those that are not).

A.

I now turn to identify and then weigh competing interests involved in this case. I have written elsewhere that "[a]n interest is a social fact, factor or phenomenon reflected by a claim or demand or desire which human beings, either individually or as groups or associations or relations, seek to satisfy and which has been recognized as socially valid by authoritative decision makers in society." Ruggero J. Aldisert, *The Judicial Process: Text, Materials and Cases* 489 (2d ed. 1996) (citing authorities). Two important interests conflict here. Using the formulation of Dean Roscoe Pound, they are: (1) "an interest in general safety, long recognized in the legal order in the maxim that the safety of the people is the highest law"; and (2) the social interest in political progress and individual mental self-assertion, taking form in "the [p]olicy in favor of free speech and free belief and opinion[.]" Roscoe Pound, "A Survey of Social Interests," 57 *Harv. L. Rev.* 1, 17, 34 (1943).

The interest in public safety is expressed in the clauses of Articles I and II of the Constitution relating to support of the military; the interest in free speech is found in the First Amendment.

I now proceed to weigh these interests.

B.

What is perceived to be the flash point of controversy here is whether the general interest in public safety has been trumped by the interests embodied in the First Amendment. Supporting the government's position are the line of cases emphasizing the Supreme Court's deference to Congress' support of the military. Arrayed against this is Appellant's insistence that the national defense interest is trumped by the teachings of *Boy Scouts of Amer. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L.Ed.2d 554 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

The Court has consistently deferred to congressional decisions relating to the military. "The case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference." *Rostker v. Goldberg*, 453 U.S. 57, 64-65, 101 S. Ct. 2646, 69 L.Ed.2d 478 (1981); *see also Weiss v. United States*, 510 U.S. 163, 177, 114 S. Ct. 752, 127 L.Ed.2d 1 (1994) ("Judicial deference . . . 'is at its apogee' when reviewing congressional decision making . . ." in the realm of military affairs). As the Supreme Court has explained, "[n]ot only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker*, 453 U.S. at 65, 101 S. Ct. 2646; *see also Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S. Ct. 2440, 37 L.Ed.2d 407 (1973) (stating "it is difficult to conceive of an area of governmental activity in which the courts have less competence . . .").

For example, in *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 89 L.Ed.2d 478 (1986), the Court

rejected a Free Exercise challenge to a military dress regulation notwithstanding the plaintiff's claim that the military's assessment of the need for the regulation "is mere *ipse dixit*, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony. . . ." *Id.* at 509, 106 S. Ct. 1310. As the Court explained, "whether or not expert witnesses may feel that religious exceptions . . . are desirable is quite beside the point[;] [t]he desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Id.*

Appellants suggest that even if the military requires physical access to campuses, there is no need for military recruiters to be given the same degree of access provided to other employers. It must be emphasized that even bare physical access is more than the Appellants are willing to tolerate; they are asserting a constitutional right to exclude the military from campuses altogether. Second, it is hardly credible for the Appellants to suggest that physical access alone is sufficient for effective military recruiting, particularly when other employers are being granted far more extensive and meaningful access. It is fair to assume that all of the facilities and services provided to prospective employers by law schools are intended to facilitate the hiring process. If military recruiters are denied the ability to reach students on the same terms as other employers, damage to military recruiting is not simply probable but inevitable. The Solomon Amendment reflects Congress' judgment about the requirements of military recruiting, and "[t]he validity of such regulations does not turn on a judge's agreement with

the responsible decision maker concerning the most appropriate method for promoting significant government interests." *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985).

What disturbs me personally and as a judge is that the law schools seem to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought of the effect of their action on the supply of military lawyers and military judges in the operation of the Uniform Code of Military Justice. They make it perfectly clear that they are not opposed to military institutions as such; they only want to curtail recruitment of military lawyers and judges. It is important for private employers to appear on campus to recruit law school graduates for positions with law school-sponsored "On Campus Recruiting Days" or "On Campus Interviewing" replete with interviews, followed by dinners and parties, but somehow the military will recruit its lawyers without appearing on campus. Somehow, Appellants urge, better *law* graduates will be attracted to the military legal branches with its lower pay and fewer benefits by some other recruiting method, for example, from the ranks of *undergraduate* ROTC programs.[29] Much of Appellants' brief takes the form of conclusory statements that the military is able

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[29] The following colloquy took place at the oral argument:

THE COURT: What else could the government do as a less restrictive alternative?

MR. ROSENKRANTZ: [A]ny number of things. Number one, ROTC, the single most effective recruiting device the military has, by their own admission.

(Tr. at 25.)

to attract top of the line or high quality students without stepping foot on campus. There is no explanation, however, why the law schools consider it important to have private national law firms come to campus and boast about first year associates' salaries and signing bonuses and emphasize that if the students want to clerk for a federal judge for a year, the firm will add another bonus. This is not only OK for the private sector, but also it's good for the law school. But we don't want military recruiters to pollute our students. No, say the law schools, what's sauce for the private sector goose is not sauce for the military gander. No, say the law schools, we don't need a level playing field; let the military shift for themselves.

In its demand for total exclusion of military recruiters from their campuses, "fair play" is not a phrase in the law schools' lexicon. They obviously do not desire that our men and women in the armed services, all members of a closed society, obtain optimum justice in military courts with the best-trained lawyers and judges. It scarcely can be an exaggeration to suggest that in many respects the need for specially competent lawyers and exceptionally qualified judges may be more important in a settled environment dominated by the strictures of discipline than in the open society of civilian life.

V.

I turn now to Appellants' compelled speech argument. They argue that the Solomon Amendment trenches on their freedom of speech by compelling them to convey a message other than their own. In making this argument, the Appellants place principal reliance on the teachings of *Hurley v. Irish-American Gay,*

Lesbian & Bisexual Group of Boston. The district court recognized, however, that nothing in *Hurley* suggests that the Solomon Amendment crosses the line into unconstitutionality. I agree completely and accept the government's analysis of this issue.

A.

In *Hurley*, the Court held that a state public accommodation law could not constitutionally be applied to compel organizers of a St. Patrick's Day parade to allow a group of gay, lesbian, and bisexual individuals to march in the parade for the purpose of conveying a public message about homosexual pride and solidarity. 515 U.S. at 572-581, 115 S. Ct. 2338. The organizers did not object to the participation of the group's members in the parade; the only question was whether the group could participate in the parade "as its own parade unit carrying its own banner." *Id.* at 572, 115 S. Ct. 2338. The Court concluded that the law's "apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own," and that in so doing, the law "violates the fundamental rule of protection under the First Amendment [ ] that a speaker has the autonomy to choose the content of his own message." *Id.* at 573, 578, 115 S. Ct. 2338.

Hurley involved an effort by the government to dictate the content of a quintessential form of expressive activity-a public parade. The Court emphasized that parades "are . . . a form of expression, not just motion," and "the inherent expressiveness of marching to make a point," *id.* at 568, 115 S. Ct. 2338, formed the predicate for its opinion. In contrast, there is nothing remotely so expressive about the activity of recruiting.

The military engages in recruiting on college campuses for precisely the same reason as do other employers: to hire employees. Recruiting is undertaken solely for instrumental reasons, not expressive ones.

To be sure, recruiting involves speaking, but the recruiter speaks purely as part of an economic transaction, and the expression is entirely subordinate to the transaction itself. It bears no resemblance to the activities of the would-be marchers in *Hurley*, who formed their group "for the very purpose of marching" in the parade, and who sought to march "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day parade." *Id.* at 560, 570, 115 S. Ct. 2338. In *Hurley*, unlike here, expression was not a subsidiary part of an instrumental activity; expression *was* the activity.

The role of the parade organizers in *Hurley* consisted of choosing the messages that would comprise the parade, and the vice of the challenged statute was that the homosexual group's protest message would be attributed to the organizers themselves. The Court reasoned that the group's participation in the parade "would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well." *Id.* at 575, 115 S. Ct. 2338.

Here, in contrast, the likelihood that members of a law school community will perceive a military recruiter's on-campus activities as reflecting the school's

"customary determination" that the recruiter's message is "worthy of presentation and quite possibly of support" is vanishingly small. Unlike bystanders watching a passing parade, law school students, and to be sure, their professors, are an extraordinarily sophisticated and well-informed group, who understand perfectly well that their schools admit military recruiters not because they endorse any "message" that may be conveyed by the recruiters' brief and transitory appearance on campus, but because the economic consequences of the Solomon Amendment have induced them to do so. The likelihood that the military's recruiting will be seen as part of a law school's own message is particularly small when schools can take-and have taken-ameliorative steps to publicize their continuing disagreement with the military's policies and the reasons for their acquiescence in military recruiting.

There is nothing to prevent the law school communities from making speeches discouraging military recruiting, posting signs and erecting huge billboards on campus or public approaches announcing their opposition and stating their reasons. That this is an important consideration has been emphasized by the Supreme Court in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980):

> [f]inally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

Id. at 87, 100 S. Ct. 2035.

Clearly, the interests expressed in *Hurley* lack the power to dilute the judiciary's traditional deference to Congress in the interest of national defense.

In addition to arguing that the Solomon Amendment trenches on freedom of speech *simpliciter*, the Appellants also contend that the statute infringes on the law schools' interests in expressive association. Although the First Amendment provides a measure of protection to expressive association, "the Supreme Court has required a close relationship between the [government] action and the affected expressive activity to find a constitutional violation." *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438 (3d Cir. 2000). In the case at bar, the impact of the Solomon Amendment on the law schools' interests in expressive association is far too remote to violate the First Amendment. In applying the balancing-of-interests test of *Roberts*, I am persuaded that the law schools' interests here fall at the remote extreme of Justice Brennan's spectrum—"where that relationship's objective characteristics locate it . . . [near] the most attenuated of personal attachments." 468 U.S. at 620, 104 S. Ct. 3244. It is important to say again that "[t]he right to associate for expressive purposes is not, however, absolute." *Id.* at 623, 104 S. Ct. 3244.

First Amendment claims based on expressive association are subject to a three-step constitutional inquiry. *See Pi Lambda Phi*, 229 F.3d at 442. The first question is "whether the group making the claim [is] engaged in expressive association." *Id.* If so, the next question is whether the government action at issue "significantly affect[s] the group's ability to advocate its viewpoints." *Id.* If it does, the final question is

whether the governmental interests served by the law outweigh the burden imposed on the group's associational interests. *Id.*; *see also The Circle School v. Pappert*, 381 F.3d 172, 178 (3d Cir. 2004). In the case at bar the district court found as a threshold matter that law schools are engaged in expressive association, but went on to determine that the Solomon Amendment does not place a significant burden on their associational interests and that, in any event, the governmental interests served by the Solomon Amendment outweigh whatever associational burden the law may impose. (J.A. at 54-75.)

C.

The majority invokes cases like *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-470, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997), *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L.Ed.2d 438 (2001), and *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), for the proposition that the Solomon Amendment impermissibly obligates them to "subsidize" military recruiting. In all these cases the challenged statutes obligated individuals to make direct payments of money to finance private speech with which they disagreed. Here, in contrast, the recruiting activities of military recruiters are paid for exclusively with federal tax revenues; the Solomon Amendment does not obligate educational institutions to pay one red cent to the government or to a private organization. Although Appellants complain of having to provide "scarce interview space" and "make appointments," (Appellant br. at 31), this kind of physical accommodation simply does not present the constitutional concern underlying cases like *Abood*, *Glickman*, *United Foods* and *Cochran*—the concern that compelling an

individual to pay for someone else's speech impinges on his right to "believe as he will" and to have his beliefs "shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 235, 97 S. Ct. 1782.

Unlike *Abood*, this case does not involve the right to make or not make "contributions for political purposes." 431 U.S. at 234, 97 S. Ct. 1782. Unlike *Glickman*, there was no mandatory assessments similar to those to be paid by growers of nectarines, plums and peaches under regulations 7 C.F.R. sections 916.31(c), 917.35(f) promulgated under the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.* Unlike *United Foods*, there were no mandatory assessments similar to those imposed on mushroom producers for the purpose of funding generic mushroom advertisements under the Mushroom Act, 7 U.S.C. § 6101. Unlike *Cochran*, there were no mandatory assessments similar to those imposed on milk producers under the Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.* The teachings of *United Foods* and *Cochran* are not applicable because, unlike the compelled advertising scheme in those cases, the principal object of the Solomon Amendment is not communication of expression but rather a furtherance of the government's compelling interest in raising and maintaining a military force as mandated by the Constitution. Unlike a regulatory scheme requiring subsidization of generic advertising for fruit, mushrooms or milk, the Solomon Amendment "impose[s] no restraint on the freedom of any [law school] to communicate any message to any audience, . . . do[es] not compel any person to engage in any actual or symbolic speech . . . [and] do[es] not compel the [law schools] to endorse or to finance any political or

ideological views." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-470, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997).

Moreover, even if law schools *were* being required to provide direct financial payments to the government to support military recruiting, which they manifestly are not, the First Amendment provides far more latitude for compelled financial support of governmental speech than it does for compelled support of private speech. *See Abood*, 431 U.S. at 259 n. 13, 97 S. Ct. 1782 (Powell, J., concurring in the judgment) ("Compelled [financial] support of a private association is fundamentally different from compelled support of government"); *United States v. Frame*, 885 F.2d 1119, 1130-1133 (3rd Cir. 1989).

Finally, what we said in *Frame* is relevant here:

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial protects or expressive activities, the nexus between the message and the individual is attenuated.

885 F.2d at 1132.

It becomes necessary to say again that our task in this case is to identify and weigh competing interests and to emphasize again that in applying the balancing-of-interests test of *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), the law schools' interests here fall at the remote extreme of Justice Brennan's spectrum—"where that relationship's objective characteristics locate it . . . [near] the most attenuated of personal attachments." 468 U.S. at 620, 104 S. Ct. 3244.

The attempt to analogize the First Amendment considerations in compelling an individual to pay for someone else's speech with a program of military recruiting fails completely because the extreme *differences* in the compared factual scenarios totally dominate over any purported *resemblances*. What we explained in *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002), is appropriate here:

> To draw an analogy between two entities is to indicate one or more respects in which they are similar and thus argue that the legal consequence attached to one set of particular facts may apply to a different set of particular facts because of the similarities in the two sets. Because a successful analogy is drawn by demonstrating the resemblances or similarities in the facts, the degree of similarity is always the crucial element. You cannot conclude that only a partial resemblance between two entities is equal to a substantial or exact correspondence.

Id. at 147.

VI.

In challenging the district court's reasoning, Appellants also seek to analogize this case to the teachings of *Dale*. As the district court recognized, (J.A. 68-70), a comparison of this case to *Dale* shows not why the Appellants should prevail in this case, as urged by the majority, but why they must lose, *see id.* at 648-650, 120 S. Ct. 2446.

In *Dale*, the Court was presented with a New Jersey public accommodations law that compelled the Boy Scouts of America ("BSA") to admit "an avowed homosexual and gay rights activist," *id.* at 644, 120 S. Ct. 2446, as an adult member and scoutmaster. The declared mission of the BSA was to "instill values in young people," *id.* at 649, 120 S. Ct. 2446, and disapproval of homosexual conduct was one of BSA's values. BSA relied on its scoutmasters to "inculcate [Boy Scouts] with the Boy Scouts' values-both expressly and by example." *Id.* at 650, 120 S. Ct. 2446. The Court reasoned that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648, 120 S. Ct. 2446. The Court found that "the presence of Dale as an assistant scoutmaster would surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," because it would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accept[ ] homosexual conduct as a legitimate form of behavior." *Id.* at 653-654, 120 S. Ct. 2446.

Let me now count the two ways the Solomon Amendment differs from the state statute in *Dale*, both of which are critical to the law's impact *vel non* on associational interests. First, the Solomon Amendment simply does not impinge on the right of educational institutions to determine their membership. *See* 10 U.S.C. § 983. It does not purport to tell colleges and universities whom to admit as students or whom to hire as professors or administrators. It merely requires them to allow the transient presence of recruiters, who are not a part of

the law school and do not become members through their mere presence. In contrast to the scoutmaster in *Dale*, recruiters do not purport to speak "for"-and cannot reasonably be understood to be speaking "for"-the law schools that they are visiting. This case thus does not involve "[t]he forced inclusion of an unwanted person in a group." *Dale*, 530 U.S. at 648, 120 S. Ct. 2446. It cannot be denied that this was the genesis of the constitutional injury in *Dale*.

Second, as noted in my discussion of *Hurley*, recruiting is an economic activity whose expressive content is strictly secondary to its instrumental goals. In contrast, the fundamental goal of the relationship between adult leaders and boys in the Boy Scout movement is "[t]o instill values in young people," a goal that is pursued "by example" as well as by word. *Id.* at 649, 650, 120 S. Ct. 2446. As a result, compelling the BSA to appoint an adult leader who was committed to "advocacy of homosexual teenagers' need for gay role models," *id.* at 645, 120 S. Ct. 2446, struck at the heart of the organization's goals.

Military recruiting is not intended to "instill values" in anyone, nor is it meant to convey any message beyond the military's interest in enlisting qualified men and women to serve as military lawyers and judges. As a result, the burden on the law schools' associational interests is vastly less significant than the burden imposed on the BSA by the statute in *Dale*.

These profound distinctions demonstrate that the teachings of *Dale* lack the power to dilute the judiciary's traditional deference to Congress in the interest of national defense.

VII.

I now turn to the proper measure by which to evaluate the weighing of competing interests implicated in this case. There should be no question that the teachings of *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968), control. In that case, the Court considered whether a 1965 amendment to the Universal Military Training and Service Act, which prohibited the knowing destruction or mutilation of a Selective Service Registration Certificate, was unconstitutional as applied to a man who burned his certificate as a symbolic expression of his antiwar beliefs. *Id.* at 369-370, 88 S. Ct. 1673. The Court stated:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in *O'Brien*'s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Id. at 376, 88 S. Ct. 1673.

In this case, the law schools portray their efforts to keep military recruiters off their campuses as "quintessential expression." (Appellant br. at 20.) But when an institution excludes military recruiters from its

campuses or otherwise restricts their access to students, it is engaging in something different from "quintessential expression." It is engaging in a course of conduct which contains both nonspeech and speech elements. The acts which the law schools claim they are compelled to do by virtue of the military's post-2001 "unwritten policy"—disseminating and posting military recruitment literature, making appointments for military recruiters to meet with students and providing military recruiters a place to meet with students—also contain both nonspeech and speech elements.

The constitutional framework for evaluating such laws is provided by *O'Brien*. Regulation of conduct that imposes incidental burdens on expression is constitutional if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377, 88 S. Ct. 1673. "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Albertini*, 472 U.S. at 689, 105 S. Ct. 2897. Regulations of conduct that place incidental burdens on expression are *not* subject to a least-restrictive-alternative requirement "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive

alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989).

The Solomon Amendment readily passes constitutional muster under these constitutional standards. The Appellants themselves do not dispute that the government has a substantial interest-indeed, a compelling one-in recruiting talented men and women for the nation's armed forces. As the Court recognized in *O'Brien*, "the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency. . . ." 391 U.S. at 381, 88 S. Ct. 1673. Effective military recruiting is the linchpin of that system. *See City of Phil.*, 798 F.2d at 86 ("Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance.")

The government's interest in military recruiting, as embodied in the Solomon Amendment, is manifestly "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377, 88 S. Ct. 1673. The Solomon Amendment makes no effort to condition federal funding on the absence of campus criticism of military policies; a law school and its faculty and students are free to denounce military recruiting policies without jeopardizing federal funding in the slightest. The only thing that matters under the Solomon Amendment is whether the institution is denying access to military recruiters. And if the institution is denying access, it is irrelevant under the Solomon Amendment whether its reasons for doing so are communicative (to convey a message about its own principles or those of the military) or non-communicative (for example, to avoid participation in a recruiting process that it regards as unfair). What matters under the Solomon Amendment

is "only the independent noncommunicative impact of [the] conduct," *id.* at 382, 88 S. Ct. 1673—its impact on the ability of the military to reach students.

The Appellants argue that because the Solomon Amendment is intended to facilitate military recruiting, and because recruiters speak to students, the governmental interest underlying the Solomon Amendment "is not unrelated to expression." (Appellant br. at 26.) But the question posed by *O'Brien* is not whether the governmental interest is "unrelated to expression," but instead whether the interest "is unrelated to the *suppression* of free expression." 391 U.S. at 377, 88 S. Ct. 1673 (emphasis added). The Appellants' argument deliberately omits the touchstone of suppression from the constitutional test. Once it is recognized that suppression of expression is the focus of *O'Brien*, the Appellants' argument falls apart, for the governmental interests served by the Solomon Amendment are manifestly unrelated to the *suppression* of anyone's expression.

It bears constant emphasis that the First Amendment test involves a balancing-of-interests as repeatedly emphasized above. The *O'Brien* measure is quintessentially correct because this case involves a weighing of the government's interest in national defense and Appellants' interest in First Amendment protections. In this posture it is difficult to conjure a case that is a more perfect fit for the exposition in *O'Brien*.

For the foregoing reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 03-4433

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., A NEW JERSEY MEMBERSHIP CORPORATION, SOCIETY OF AMERICAN LAW TEACHERS, INC., A NEW YORK CORPORATION, ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

Nov. 5, 2003

OPINION

LIFLAND, District Judge.

Plaintiffs Forum for Academic and Institutional Rights, Inc. ("FAIR"), Society of American Law Teachers, Inc. ("SALT"), The Coalition for Equality ("CFE"), Rutgers Gay and Lesbian Caucus ("RGLC"), law professors Erwin Chemerinsky and Sylvia Law (collectively, "Law Professors"), and law students Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild (collectively, "Law Students") seek a

preliminary injunction enjoining enforcement of the so-called Solomon Amendment—a statute conferring authority on the United States Secretary of Defense to deny federal funding to institutions of higher education that prohibit or effectively prevent on-campus military recruiting. Plaintiffs contend that the Solomon Amendment is unconstitutional because it (1) conditions a benefit—federal funding—on the surrendering of law schools' First Amendment rights of academic freedom, free speech, and freedom of expressive association; (2) discriminates on the basis of viewpoint by promoting only a pro-military recruiting message and by punishing only those schools that exclude the military because they find the military's policy against homosexual conduct morally objectionable; and (3) violates the void-for-vagueness doctrine for lack of clear guidelines and for conferring unbridled discretion on military bureaucrats to decide which institutions to target and what acts or omissions amount to non-compliance with the statute. Defendants (collectively, "the Government") move to strike or, in the alternative, to dismiss Plaintiffs' Second Amended Complaint for lack of standing, and otherwise oppose the Motion for a Preliminary Injunction on the basis that the Solomon Amendment is a valid exercise of the Spending Clause that conditions federal funding on conduct unrelated to speech.

As discussed more fully herein, the Government's Motion to Strike will be denied because Plaintiffs obtained express leave of Court to file a Second Amended Complaint. The Government's Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Standing will be denied on the basis that the

factual allegations are sufficient to confer standing on all associational and individual plaintiffs.

Finally, Plaintiffs' Motion for a Preliminary Injunction will be denied on the basis that Plaintiffs have not established a likelihood of success on the merits of their constitutional challenges to the Solomon Amendment. As with all constitutional challenges to legislation, the question is not whether the Court believes that the legislation is wise or unwise, or even fair or unfair. Those are value judgments which can and do vary from time to time, from person to person, and from issue to issue. The question is whether Congress, a co-equal branch of our government, has overstepped the boundaries prescribed, albeit in general terms, by our Constitution. Those boundaries have been made clearer by centuries of experience with case-by-case development of constitutional doctrines. Application of those doctrines, as explained in the cases cited, to the facts of this case, has led the Court to the conclusion that the compulsion exerted by the Solomon Amendment, as an exercise of Congress' spending power and its power and obligation to raise military forces, on balance, is not violative of the First Amendment rights of free speech, expressive association, and academic freedom where that compulsion operates primarily to compel or limit conduct, not speech or expression, and where, to the extent speech or expression is diluted, it can be readily and freely reconstituted, thus preserving the message for propagation by all who wish to express it and to all who may hear it.

PARTIES

Plaintiff FAIR, an association of law schools and law faculties, is a membership corporation organized under

the laws of the State of New Jersey. Membership is open to law schools, other academic institutions, and faculties that vote by a majority to join. FAIR's stated mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." (Second Amended Complaint ¶ 7(a) [hereinafter "Am. Compl."]). With few exceptions, FAIR membership is kept secret. (Am. Compl. ¶ 7(d)).

Plaintiff SALT is a New York corporation with nearly 900 law faculty members committed "to making the legal profession more inclusive and to extending the power of the law to underserved individuals and communities." (Am. Compl. ¶ 8). Plaintiff Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California Law School ("USC Law"), and Plaintiff Sylvia Law is the Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry at New York University Law School ("NYU Law"). Plaintiffs CFE, of Boston College Law School, and RGLC, of Rutgers University School of Law, (collectively, "Law Student Associations") are student organizations committed "to furthering the rights and interests of all groups including gays and lesbians." (Am. Compl. ¶ 9). Plaintiffs Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild are students at Rutgers University School of Law.

Defendant Donald Rumsfeld heads the Department of Defense ("DOD") in his capacity as the United States Secretary of Defense. The DOD is charged with implementing the Solomon Amendment and making the ultimate determination as to whether an institution is in compliance therewith. Defendant Rod Paige heads the

Department of Education in his capacity as the United States Secretary of Education. Defendant Elaine Chao heads the Department of Labor in her capacity as the United States Secretary of Labor. Defendant Tommy Thompson heads the Department of Health and Human Services in his capacity as the United States Secretary of Health and Human Services. Defendant Norman Mineta heads the Department of Transportation in his capacity as the United States Secretary of Transportation. Defendant Tom Ridge heads the Department of Homeland Security as the United States Secretary of Homeland Security. The Departments collectively make available billions of dollars in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

PROCEDURAL HISTORY

On Friday, September 19, 2003, Plaintiffs sought a temporary restraining order ("TRO") and preliminary injunction enjoining enforcement of the Solomon Amendment. The Court denied Plaintiffs' request for a TRO at a hearing held the same day. At the hearing, the Assistant United States Attorney informed the Court of a Government shut down in the District of Columbia due to Hurricane Isabel. Given the Government's inability to respond to Plaintiffs' voluminous submissions—including an over-length brief and a three-inch thick bound volume of eighteen declarations —the Court set a briefing schedule.

The Government timely submitted a Motion to Dismiss for Lack of Standing and Opposition to Plaintiffs' Motion for a Preliminary Injunction on Friday, September 26, 2003. Plaintiffs submitted a reply brief on Monday, September 29, 2003. During a

telephone conference held later that day, the Court granted Plaintiffs' request to respond more fully to the Government's Motion to Dismiss and ordered both parties to further brief the impact on standing, if any, of FAIR's secret membership list.

The Court heard oral argument on Friday, October 10, 2003. At argument, counsel for Plaintiffs advised the Court that a First Amended Complaint had been filed earlier that morning. Counsel also indicated that he was prepared to file a Second Amended Complaint based on new information that a law school member of FAIR was willing to be publicly identified. The Court indicated that it would accept and direct the Clerk to file the Second Amended Complaint, subject to its verification. On October 15, 2003, Plaintiffs filed a Second Amended Complaint identifying two members of FAIR—Golden Gate University School of Law and the Faculty of Whittier Law School. (Am. Compl. ¶ 7(d)). By letters dated October 15 and 17, 2003, Plaintiffs informed the Court that NYU Law and the Faculty of Chicago-Kent University School of Law had also agreed to be publicly identified as members of FAIR.

On October 22, 2003, the Government moved to strike or, in the alternative, to dismiss Plaintiffs' Second Amended Complaint for lack of standing. Plaintiffs submitted a responsive brief the following day.

BACKGROUND AND FACTS

The facts are drawn largely from Plaintiffs' Second Amended Complaint and declarations submitted in connection with Plaintiffs' Motion for a Preliminary Injunction. At this juncture, the Government has not

challenged or substantially supplemented Plaintiffs' factual assertions.

Solomon Amendment

The Solomon Amendment, in pertinent part, reads as follows:

> **(b) Denial of funds for preventing military recruiting on campus.**—No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—
>
> > (1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students . . . on campuses, for purposes of military recruiting; or
> >
> > (2) access by military recruiters for purposes of military recruiting to . . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution).

10 U.S.C. § 983(b) (2003). Subsection (d)(2) identifies funds made available for the Departments of Defense and Transportation, as well as those in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act. *Id.* § 983(d)(2). The Solomon Amendment also applies to funds from the Department of Homeland Security.

Pub.L. No. 107-296, Title XVII, §§ 1704(b)(1),(g), 116 Stat. 2314, 2316 (2002).

A subelement of an institution is defined as "a discrete (although not necessarily autonomous) organizational entity that may establish policies or practices affecting military recruiting and related actions." 32 C.F.R. § 216.3(d). A law school is an example of a subelement. *Id.* Current DOD regulations provide that limitations on DOD funding apply to an offending subelement as well as its parent institution, whereas limitations on other federal funding apply only to the offending subelement. 32 C.F.R. § 216.3(b)(1) (stating that "limitations on the use of funds . . . shall apply only to the subelement and not to the parent institution as a whole"); 65 Fed. Reg. 2056 (Jan. 13, 2000) (prohibiting DOD from providing funds to institution of higher education and any subelement of same upon a determination that institution or any subelement prohibits or in effect prevents military recruiting on campus). Schools deemed ineligible for federal funding pursuant to the Solomon Amendment are identified in the Federal Register at least once every six months. 32 C.F.R. § 216.5(a)(4).

Not every school that denies the military recruiters access to its campus or to its students risks losing federal funding. The Solomon Amendment and the DOD regulations promulgated thereunder carve out various exceptions. The statute exempts schools that (1) have ceased an offending policy or practice or (2) have a longstanding, religious-based policy of pacifism. 10 U.S.C. § 983(c). The DOD regulations exempt schools that bar all employers from on-campus recruiting, and those able to demonstrate that "the degree of access by military recruiters is at least equal in quality

and scope to that afforded to other employers." 32 C.F.R. § 216.4(c)(3). Also exempted are schools at which student interest does not justify accommodating military recruiters. *Id.* § 216.4(c)(6)(ii). There are also exemptions pertaining to the requirement in Section 983(b)(2) that schools provide the military with student recruiting information. 32 C.F.R. § 216.4(c)(4)-(5).[1]

History of the Solomon Amendment

A policy of discouraging barriers to on-campus military recruitment pre-dates the 1994 passage of the Solomon Amendment by nearly thirty years. *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). Congress enacted legislation in the 1960s and 1970s that, much like the Solomon Amendment, authorized the withholding of defense funds from schools that maintained a policy barring military recruiters or otherwise eliminated the Reserve Officers Training Corps program. *Id.* (citing Department of Defense Authorization Act of 1973, Pub.L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972) [hereinafter "the DDA of 1973"]; Department of Defense Authorization Act of 1971, Pub.L. No. 91-441, § 510, 84 Stat. 905 (1970); National Aeronautics and Space Administration Authorization Act of 1969, Pub.L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968); 118 Cong. Rec. 22,346 (1972)). Section 606(a) of the DDA of 1973, for example, provided that

> [n]o part of the funds appropriated pursuant to this or any other Act for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if the Secretary of

[1] Plaintiffs have not directly challenged 10 U.S.C. § 983(b)(2).

> Defense or his designee determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution. . . .

DDA of 1973, Pub.L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972).

The apparent impetus for the Solomon Amendment was the continued refusal of many educational institutions to allow the military to engage in on-campus recruiting.[2] The original version of the statute denied

[2] Legislative history indicates that the Solomon Amendment sought to "not give taxpayer dollars to institutions . . . interfering with the Federal Government's constitutionally mandated function of raising a military" and to encourage recruitment of "the most highly qualified candidates from around the country." 141 Cong. Rec. E13-01 (Jan. 4, 1995). Representative Solomon introduced the law as an effort to

> tell[ ] recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment rights. But do not expect Federal Dollars to support your interference with our military recruiters.

140 Cong. Rec. H3861 (1994). Representative Pombo, a co-sponsor, similarly noted "[a] growing, and misguided, sense of moral superiority . . . creeping into the policies of colleges and universities in this country." *Id.* at H3863. He urged that those institutions

> need to know that their starry-eyed idealism comes with a price. If they are too good—or too righteous—to treat our Nation's military with the respect it deserves . . .—then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America.

Id. He ended by encouraging his "colleagues to support the Solomon Amendment, and send a message over the wall of the ivory tower of higher education." *Id.*

federal funding "to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students." National Defense Authorization Act of 1995, Pub.L. No. 103-337, § 558, 108 Stat. 2663 (1994). Targeted funds included only those administered by the DOD and only those flowing to the particular school, or subelement, that declined to allow the military to recruit on campus. *Id.*; 61 Fed. Reg. 7739 (Feb. 29, 1996). Thus, for example, a law school that did not permit on-campus military recruiting risked only DOD funds allocated for the law school itself, and not funds flowing to its parent university.

As of 1997, the Solomon Amendment more broadly provided that any "covered education entity" that prevented access by military recruiters to campuses, students, or student information risked not only DOD funding, but all funds available from the Departments of Labor, Health and Human Services, Education, and any related agency. Targeted funding also included "any grant of funds to be available for student aid." Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996) (formerly 10 U.S.C. § 503), repealed by Pub. L. No. 106-65, 113 Stat. 512 (1999). The DOD continued to interpret the statute to mean that only a school's subelement that violated the Solomon Amendment risked losing federal funding. 63 Fed. Reg. 56,819 (stating that non-compliance of "only a subelement of a parent institution" implicated funding "only to the subelement and not to the parent institution as a whole").

Legislative history also indicates that the DOD did not support passage of the Solomon Amendment. *See* 140 Cong. Rec. H3860-03 (1994) (Reps. Underwood, Harman, Schroeder). To the contrary, the DOD opposed it as "unnecessary, duplicative, and potentially harmful to defense research initiatives." *Id.* at H3863 (Rep. Underwood).

In January 1998, the Department of Education ("DOE") clarified the effect of the Solomon Amendment on programs of student financial assistance under Title IV of the Higher Education Act of 1965, as amended. 63 Fed. Reg. 56,821 (Oct. 23, 1998). The DOE explained that the Solomon Amendment applied only to "campus based" student aid programs for which the educational institutions (not the students) applied and were awarded funding. Such programs included the Federal Perkins Loan, the Federal Work-Study, and the Federal Supplemental Education Opportunity Grant programs. *Id.* Direct student aid programs—funds made directly available to students (*e.g.*, Federal Pell Grant, the Federal Family Education Loan, and the Federal Direct Loan programs)—remained outside the scope of the statute. In 1999, the Frank-Campbell Amendment expressly removed from the scope of the Solomon Amendment "any Federal grant of funds to an institution of higher education to be available solely for student financial assistance or related administrative costs." Department of Defense Appropriations Act of 2000, § 8120, Pub. L. No. 106-79, 113 Stat. 1260 (1999).

In 2000, the DOD amended its regulations to eliminate the subelement limitation as to DOD funds. 65 Fed. Reg. 2056 (Jan. 13, 2000). The subelement limitation remained in effect as to funds from other federal agencies. *See* 32 C.F.R. § 216. Thus, a non-compliant law school risked DOD funds flowing to both the law

school and its parent university, as well as other federal funding flowing to the law school (but not to the parent institution).

Law School Non-Discrimination Policies

Law schools have determined that diversity among their faculty and students is essential to their core mission of "train[ing] the next generation of leaders to pursue justice, respect the rule of law, and stand by principle." (Am. Compl. ¶¶ 19-21) ("[L]aw schools have promoted, demanded, and strictly enforced, not merely diversity, but also tolerance and respect."). Nearly every accredited American law school has adopted policies against discrimination on the basis of categories such as national origin, religion, gender, race, ethnicity, marital status, parental status, veteran status, physical disability, age, and sexual orientation. (Am. Compl. ¶¶ 21-22). Law schools admit students, award scholarships, hire and promote faculty, and hire staff consistent with their non-discrimination policies. (Am. Compl. ¶ 23). A typical law school non-discrimination policy states:

> [The Law School] is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, or sexual orientation.

(Am. Compl. ¶ 22). The trend of including sexual orientation as a protected category in non-discrimination policies began in the late 1970s. NYU Law was the first school to do so, and others followed its lead. (Rosenkranz Decl. ¶ 10).

As corollaries to their non-discrimination policies, law schools adhere to recruiting policies whereby they refuse to offer school resources, support, or endorsement to any employer that discriminates based on protected categories. (Am. Compl. ¶ 23). The recruitment policies are applied even-handedly to all employers. (Am. Compl. ¶ 26). The policies, in the law schools' judgment, serve both pedagogical and instrumental purposes by teaching values students would not otherwise learn from case books and by fostering an environment of free and open discourse. (Am. Compl. ¶ ¶ 24-25). The policies neither prevent discriminating employers from contacting students, nor steer students away from such employers. While students remain free to seek jobs with employers that discriminate, including the military, they must do so without school support or resources. (Am. Compl. ¶ 26).

The AALS Position

The Association of American Law Schools ("AALS") is a non-profit association of law schools committed to improving the legal profession through legal education. It functions "as the learned society for law teachers and is legal education's principal representative to the federal government and to other national higher education organizations and learned societies." American Association of Law Schools, *What is the AALS*? at http://www.aals.org/about.html. In 1990, the AALS voted to include sexual orientation as a protected category in law school non-discrimination policies. (Rosenkranz Decl. ¶ 10). Accordingly, all of the more than 160 member law schools of the AALS extended their non-discrimination policies to cover sexual orientation. (*Id.*).

Section 6-4 of the By-Laws of the AALS requires member schools to, among other things, provide "students and graduates with equal opportunity to obtain employment, without discrimination or segregation" on the basis of sexual orientation and other protected categories. (Rosenkranz Decl. ¶ 10, Ex. 1). Schools must communicate to employers their "firm expectation" that the employers will observe the principle of equal opportunity. (*Id.*). Employers seeking to utilize member law school career services must provide written assurance that they will not discriminate on the basis of protected categories; the schools refuse to assist any employer that declines to so certify. (Rosenkranz Decl. ¶ 7).

The AALS has recognized the tension between its By-Laws requiring non-discrimination and the Solomon Amendment: "[T]he Amendment . . . places most law schools in the difficult position of either foregoing financial aid funds that are critical to their students or receiving the financial aid funds but failing to provide an environment that adequately protects its students from the experience of discrimination." (Rosenkranz Decl. ¶ 10, Ex. 3). In apparent resolution of that tension, the AALS has suggested "ameliorative" measures to be taken by law schools that choose to permit on-campus military recruiting so that those schools may be deemed compliant with the By-Laws:

> [E]ach school should assure that all its students, as well as others in the law school community, are informed each year that the military discriminates on a basis not permitted by the school's nondiscrimination rules and the AALS bylaws and that the military is being permitted to interview only because of the loss of funds that would otherwise be

> imposed under the Solomon Amendment (or, in appropriate cases, because of higher university directives that compel the law school to permit access). Other ameliorative acts that schools might consider include forums or panels for the discussion of the military policy or for the discussion of discrimination based on sexual orientation. Although no specific type of amelioration is required, the Executive Committee will examine the actions schools take in the context of the totality of the school's efforts to support [a] hospitable environment for its students. In assessing that environment, the Association will consider, among other things, the presence of an active lesbian and gay student organization and the presence of openly lesbian and gay faculty and staff.

(*Id.*).

Law School Compliance with the Solomon Amendment

Law schools are loathe to endorse or assist recruiting efforts of the United States military because of its policy against homosexual activity.[3] Law school ad-

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[3] The military's prohibition against homosexual conduct is codified at 10 U.S.C. § 654. The policy provides for the separation of a member of the armed forces upon a finding:

> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
>
> (A) such conduct is a departure from the member's usual and customary behavior;

ministration, faculty, and students have openly expressed their disapproval with the military's policy in a variety of ways. Some law schools, for example, have posted ameliorative statements throughout the school advising that the military does not comply with the school's non-discrimination policies. (Appleton Decl. ¶ 18, Ex. 9; Law Decl. ¶ 22). Law faculty and student bar resolutions also have condemned the military's policy and, correspondingly, expressed support of non-discrimination policies. (Appleton Decl. ¶¶ 14, 16; Law Decl. ¶¶ 22-23). In addition, students and faculty have held demonstrations protesting on-campus military recruiting. (Appleton Decl. ¶ 19; Gerken Decl. ¶¶ 24-28; Law Decl. ¶ 35, Smolik Decl. ¶ 2; Sweeney Decl. ¶ 11).

B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654.

Law schools have attempted to comply with the Solomon Amendment, notwithstanding the military's discriminatory policy. While some law schools denied military access to campus, others developed ways to adhere to their respective non-discrimination policies and still permit the military access to interested students. (Am. Compl. ¶¶ 7(j),(k)). Some law schools permitted the military to recruit on campus, but refused to schedule student interviews. (*Id.* ¶ 7(k)). Other law schools allowed military recruiters to use university facilities, but not law school facilities. (*Id.*). Many refused to let military recruiters participate in school-sponsored job fairs. (*Id.*). Still other schools refused to match students with recruiters or post military literature. (*Id.* ¶ 34). One law school, for example, allowed military recruiters on campus, but kept military recruiting literature separate from its career services office and arranged interviews through the dean's office. (Rosenkranz Decl. ¶ 19).

On occasion, the military has expressed satisfaction with the law schools' efforts to accommodate military recruiters. For instance, a 1998 letter from the Department of the Army thanked USC Law's career services office "for providing . . . military recruiters a degree of access to students that is equal in quality and scope to that afforded other employers, consistent with the regulations. . . ." (Chemerinsky Decl. ¶ 19). Another 1998 letter from the Department of the Army thanked NYU Law for its efforts in notifying students about a military recruiter's scheduled trip to the New York area. (Law Decl. ¶ 16; Ex. 6). That same letter signaled an abundance of recruits, stating that "[c]ompetition has become very keen in the past few years for . . . JAG attorney positions" and that, as a

result, "some very qualified applicants will not be selected for a position." (*Id.*).

However, in or about 2001, the military began to express dissatisfaction with the law schools. The DOD and officers of various branches of the military notified various schools that they were not in compliance with the Solomon Amendment. Plaintiffs have submitted detailed declarations recounting Solomon Amendment stories from at least nine different law schools. In general, Plaintiffs allege that the DOD threatened law schools with the loss of not only DOD funding, but all federal funding, if the schools did not afford the military full access to career services, the students, and the law schools. (Am. Compl. ¶ 36; Chemerinsky Decl. ¶ 21; Gerken Decl. ¶ 16). Plaintiffs further allege that, despite written requests from various law schools, the DOD failed to offer specific guidance as to what the military requires of the law schools in order to be deemed compliant with the Solomon Amendment (Am. Compl. ¶ 37; Rosenkranz Decl. ¶ 22; Eskridge Decl. ¶¶ 39-55), and replied simply by way of notification that the schools remained in default (Am. Compl. ¶¶ 7(m), 37).

Solomon Amendment stories from Yale Law School and USC Law[4] are illustrative of the DOD's current stance. Yale Law School consistently permitted military recruiters on campus to meet students in response to expressed student interest, and provided military recruiters access to student directory information. (Eskridge Decl. ¶¶ 37, 40). But the school-sponsored off-campus interview programs were only open to

[4] Yale Law School and USC Law are mentioned for illustrative purposes only. Neither institution is a party to this action.

employers that complied with the school's non-discrimination policy. (Eskridge Decl. ¶ 40). By letter dated May 29, 2002, United States Army Colonel Tate notified Yale that the Law School was non-compliant with the Solomon Amendment insofar as it (1) maintained a policy that limited military recruiting; (2) did not provide the military access to law school-sponsored interviewing programs; and (3) did not permit the military to recruit on campus unless invited on by a law student or law student organization. (Eskridge Decl. ¶ 41, Ex. 10). The letter threatened funding denial unless, by July 1, 2002, the Army received information that the law school had modified its policies to conform to federal requirements. (*Id.*). By letter dated May 29, 2003, Acting Deputy Under Secretary of Defense William Carr notified Yale that allowing military recruiters to use law school facilities, but not the career development office, violated the Solomon Amendment because the DOD had interpreted the statute "to require universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters." (Eskridge Decl. ¶ 55; Ex. 18). According to Mr. Carr, not allowing the military access to the law school's career development services would "impose substantial burdens and restrictions . . . to schedule interviews with students through e-mail or other means, rather than through the standard processes provided . . . to other employers." (*Id.*).

USC Law encountered a similar situation. By letter dated December 17, 2001, United States Air Force Colonel Daniel B. Fincher wrote to the President of USC requesting clarification of the Law School's policies concerning military recruitment. USC's General Counsel responded by explaining the school's policy

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exception for military recruiters. (Eskridge Decl. ¶ 20; Ex. 6). Under the policy exception, the law school (1) provided military recruiters with standard employer information and materials; (2) referred the military recruiter to on-campus ROTC offices for scheduling of interview space; (3) posted a notice in the school's weekly career services newsletter indicating the scheduled recruiter visit; (4) provided students with information about how to apply for an interview with the military; and (5) made available military recruitment materials to all students. On May 30, 2002, Colonel Fincher notified USC that the Law School's policy did not conform to the Solomon Amendment and to do so USC must "allow[ ] the military full access to the services of the Career Services Office, the students, and the law school." (Chemerinsky Decl. ¶¶ 20- 21).

Recruitment Seasons

Most law schools host employers in the fall and spring. (Am. Compl. ¶ 41). At the close of fall recruiting season, law school career services personnel begin collecting and disseminating literature, making arrangements, and organizing appointments for employers who will be arriving in the spring. (*Id.*). The same is true for spring recruitment season. Thus, preparation for upcoming recruitment seasons occurs year round. (*Id.*). As of the fall 2003 recruiting season, every law school in the nation that receives federal funds has suspended permanently their non-discrimination policies as applied to military recruiters. (Am. Compl. ¶ 40).

THE GOVERNMENT'S MOTION TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT

The Government moves to strike Plaintiffs' Second Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a), which states that a party may amend a pleading once as a matter of right and thereafter "only by leave of court or by written consent of the adverse party." The Government contends that Plaintiffs failed to obtain express leave of court or written consent to file the Second Amended Complaint. To the contrary, the Court granted Plaintiffs leave to file the Second Amended Complaint at oral argument. (Tr. at 68:5-8) ("I will accept and direct the clerk to file your [Second] amended complaint. . . ."). The Motion to Strike Plaintiffs' Second Amended Complaint will be denied.

THE GOVERNMENT'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT FOR LACK OF STANDING [5]

I. Standard of Review

A party may challenge the court's jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), either by attacking the allegations on the face of the complaint, or the facts supporting the allegations. *Carpet Group Int'l v. Oriental Rug Imp. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000); *Mortensen v. First Fed. Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Where, as here, a party challenges the court's subject matter jurisdiction on the pleadings, the court "must

[5] The brief in support of the Government's Motion to Dismiss Plaintiffs' Second Amended Complaint For Lack of Standing incorporates by reference the arguments made in the Government's original Motion to Dismiss. The Court will address the arguments advanced in both submissions.

assume that the allegations contained in the complaint are true." *Cardio-Med. Assocs. Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 75 (3d Cir. 1983). The court's evaluation is thus similar to the analysis used in evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Mortensen*, 549 F.2d at 891; *Cohen v. Kurtzman*, 45 F. Supp. 2d 423, 428 (D.N.J. 1999).

II. Analysis

Article III, § 2 of the United States Constitution "extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998). Standing is "an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). To satisfy the "case or controversy" requirement for standing a plaintiff must demonstrate that it has suffered (1) an injury-in-fact (2) caused by the conduct complained of, and (3) that such injury is likely to be redressed by a favorable judicial decision. *Id.*; *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 283 (3d Cir. 2002). An injury-in-fact is defined as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural and hypothetical.'" *Lujan*, 504 U.S. at 560, 112 S. Ct. 2130 (citations and internal quotations omitted). The causal connection required is that the injury be "fairly traceable" to the challenged conduct. *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 96 S. Ct. 1917, 48 L.Ed.2d 450 (1976)).

Standing is also subject to certain prudential limitations that reflect the need for judicial restraint. One such limitation is that a plaintiff typically must assert his own legal rights and cannot rest his claim on third-party interests. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975). However, an exception to that rule is that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Id.* at 511, 95 S. Ct. 2197. Whether an association has standing to sue on behalf of some or all of its members depends on whether

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977).

Standing, be it individual or associational, goes to whether a litigant is entitled to have a court decide a particular case. "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518, 95 S. Ct. 2197. That inquiry is "especially rigorous" where, as here, "reaching the merits of a dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20, 117 S. Ct. 2312, 138 L.Ed.2d 849 (1997).

A. FAIR

The Government argues that any threat of injury from enforcement of the Solomon Amendment would be to law schools, whose involvement as unidentified members of FAIR is insufficient to satisfy the associational standing requirement that one or more members has standing in their own right. The Government further argues that merely naming law school members of FAIR is insufficient to demonstrate standing where (1) none of the factual allegations demonstrate that the law schools, as part of larger parent universities, are entitled to bring suit on their own behalf and potentially against the wishes of the parent institution; (2) the parent institutions, not the law schools, have standing in their own right insofar as they make the ultimate decision to comply with the Solomon Amendment and stand to suffer a denial of funding pursuant thereto; and (3) law schools violate the prudential rule against third-party standing by resting their claims on the legal rights of their parent universities that are not involved in this suit. Lastly, the Government contends that FAIR does not satisfy the requirements for associational standing insofar as the as-applied challenge to the Solomon Amendment demands participation of individual members in the lawsuit.

The Court will first analyze whether FAIR members have standing in their own right. *See Hunt*, 432 U.S. at 343, 97 S. Ct. 2434. FAIR members include law schools and law faculties that collectively voted to join FAIR.[6] (Am. Compl. ¶ 7). The Second Amended Complaint

[6] To assist the Court in evaluating FAIR's standing, Plaintiffs submitted the FAIR membership list for in camera review.

describes the alleged harm to FAIR members as follows:

> Every member of FAIR has autonomy to develop policies directed at enhancing its academic atmosphere and safeguarding its ability to recruit and retain diverse students. Every member of FAIR exercised that autonomy to adopt a policy that prohibits discrimination on the basis of, among other categories, sexual orientation. Every member of FAIR requires those employers who seek to use the law schools' career placement offices, facilities and resources to abide by these non-discrimination policies. Every member of FAIR applies these non-discrimination policies to all employers, and has declined to make an exception for military recruiters. As a direct result of the Solomon Amendment, or the DOD's interpretation and application of the Solomon Amendment, every FAIR member has entirely suspended the application of its non-discrimination policy to military recruiters, including any symbolic gestures to signal its adherence to non-discrimination. Every member of FAIR believes that the suspension of its non-discrimination policy has compromised the message of non-discrimination that FAIR members previously sent to their communities and has undermined its efforts to provide its students and faculty with an atmosphere conducive to the free exchange of ideas.

(Am. Compl. ¶ 7(d)).

Taking Plaintiffs' allegations to be true, as the Court must, FAIR has satisfied its burden to demonstrate that it has law school members who have abandoned

their non-discrimination policies due to threatened enforcement of the Solomon Amendment. The Solomon Amendment plainly affects law schools; the Government concedes that any threatened injury from the statute would be to law schools. (Gov't Opp'n Prelim. Inj. at 11). FAIR alleges that its law school members' First Amendment rights have been violated by virtue of having to compromise their message of non-discrimination due to the Solomon Amendment. Thus, FAIR members have alleged a concrete injury fairly traceable to the Solomon Amendment that is likely to be redressed were enforcement of the statute enjoined. *See Warth*, 422 U.S. at 501-02, 95 S. Ct. 2197; *Lujan*, 504 U.S. at 560-61, 112 S. Ct. 2130.

It is true that FAIR members have not as of yet suffered an actual loss of funding pursuant to enforcement of the Solomon Amendment. But law school members of FAIR have a sufficient stake in this controversy insofar as the allegations demonstrate that the schools have capitulated to government threats of losing federal funding due to non-compliance with the Solomon Amendment. The relevant injury for standing purposes is the government-induced abandonment of the schools' non-discrimination policies and not, as the Government urges, an actual loss of funding.

Nor does the secrecy of FAIR's membership list defeat standing. FAIR membership is kept secret to allay members' fears of retaliatory efforts on behalf of the government and private actors if the law schools were to participate as named plaintiffs in a legal challenge. (Am. Compl. ¶ 7(b); Greenfield Decl. ¶¶ 5-6). The fear is that

> Members of Congress will cancel appropriations to their sister institutions behind closed doors and that Government bureaucrats will reject contracts or grants or will decline to renew them—all without any explanation, but as punishment for what they view as an affront to the military. They also fear that they and their sister institutions will be singled out for virulent and unfair attacks by politicians and in the press, attacks that have already materialized in such mainstream media outlets as the Wall Street Journal, The Legal Times, and Fox News. Such attacks, unfairly mischaracterizing the lawsuit and the interests of FAIR's members in the lawsuit, expose FAIR's members and their sister institutions to the loss of students, the anger of alumni, and the loss of donations.

(Am. Compl. ¶ 7(b)). While the Court cannot evaluate such fears, it agrees with Plaintiffs, for the reasons that follow, that FAIR need not reveal its membership list at the pleading stage in order to bring suit on its members' behalf.

In *Doe v. Stincer*, 175 F.3d 879, 881 (11th Cir. 1999), an Advocacy Center brought a claim on behalf of mentally ill patients alleging that the Americans with Disabilities Act preempted a Florida statute that blocked patient access to certain medical records. The Attorney General of the State of Florida argued that the Advocacy Center lacked standing to sue on behalf of its members because "it has not brought suit on behalf of a specific individual who" had suffered harm traceable to the statute at issue. *Id.* at 884. The Eleventh Circuit Court of Appeals disagreed, concluding that the association was not required to "name the members on whose behalf suit is brought." *Id.* at

882 ("[U]nder Article III's established doctrines of representational standing, we have never held that a party suing as a representative must specifically name the individual on whose behalf the suit is brought and we decline to create such a requirement. . . ."). The court went on to explain that "it is enough for the representational entity to allege that one of its members or constituents has suffered an injury that would allow it to bring suit in its own right." *Id.* at 885. The court ultimately dismissed the complaint because the Advocacy Center failed to allege "that one of its constituents otherwise had standing to sue to support the district court's grant of summary judgment and injunctive relief." *Id.* at 886.

FAIR has done what the Advocacy Center in *Doe* failed to do—allege facts establishing that one or more of its members have suffered an injury sufficient to confer standing in their own right. The Court declines the Government's invitation to require that FAIR take the next step and publicly name all of its members.

Authorities cited by the Government do not suggest a different result. *See United States v. AVX Corp.*, 962 F.2d 108 (1st Cir. 1992); *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334 (D.N.J. 2003); *Kessler Inst. for Rehabilitation v. Mayor & Council of Essex Fells*, 876 F. Supp. 641 (D.N.J. 1995). In *United States v. AVX Corp.*, the First Circuit Court of Appeals held that an environmental organization's assertions of environmental injury were not specific enough to sustain a claim of associational standing because it had asserted "only the most nebulous allegations regarding its members' identities and their

connection to the relevant geographic area." 962 F.2d at 117. The court described the deficiency as follows:

> The averment has no substance: the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of the affected resources is left open to surmise. In short, the asserted injury is not anchored in any relevant particulars. . . . A barebones allegation, bereft of any vestige of a factual fleshing-out, is precisely the sort of speculative argumentation that cannot pass muster where standing is contested.

Id.

Likewise, in *American Immigration Lawyers Ass'n v. Reno*, the District Court for the District of Columbia held that immigrant associations lacked associational standing because the organizational plaintiffs failed to demonstrate that their members possessed standing. 18 F. Supp. 2d at 52. That case involved challenges to a summary removal process pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. There, the plaintiff organizations failed to demonstrate that their membership included immigrants who suffered an injury-in-fact and thus would have standing in their own right. Plaintiffs' complaint stated that "[m]embers of some of the Plaintiff organizations have sought and will continue to seek asylum in the United States." *Id.* at 51. The complaint generally alleged harm to members of all organizations, and identified vague groups of members that might suffer harm. *Id.* The court noted that the obligation to allege facts sufficient to establish injury to its members "extends to identifying the member or members" of the organization, and went on to explain that "[n]owhere in their

pleadings do the plaintiffs identify one injured person by name, allege that the injured person is a member of one of the plaintiff organizations (naming the specific organization), or allege facts sufficient to establish the harm to that member." *Id.* The complaint even conceded that it would be "impossible" to identify individual refugees before they suffered harm. *Id.* Based on those allegations, the court concluded that the plaintiff associations had failed to allege facts sufficient to establish that its members had standing in their own right. *Id.* at 52.

While the factual allegations in *AVX Corp.* and *American Immigration Lawyers Ass'n* suffered from a common deficiency—no showing that association members had suffered an injury-in-fact—the necessary particulars were case-specific. Geographic location was critical to establishing members' injury-in-fact in the environmental context, *AVX Corp.*, 962 F.2d at 117, whereas exposure to expedited removal proceedings was critical to establishing members' injury-in-fact in the immigration context. *American Immigration Lawyers Ass'n*, 18 F. Supp. 2d at 51. Here, the necessary particulars are that FAIR has members who have suffered an injury-in-fact traceable to the Solomon Amendment. Plaintiffs have alleged that FAIR has law school members and that those members maintain nondiscrimination policies to which they cannot adhere due to restrictions imposed by the Solomon Amendment. There are no remaining uncertainties as to the effect of the Solomon Amendment on FAIR law school members. Thus, the factual allegations are sufficient to confer associational standing on FAIR.

Similarly unavailing is *Kessler Inst. for Rehabilitation v. Mayor & Council of Essex Fells*, in which a non-

profit organization dedicated to advocacy and support for handicapped persons in New Jersey failed to establish associational standing to bring suit on behalf of its members. 876 F.Supp. at 656. The sole allegation about the advocacy group was that it was

> a non-profit corporation in the state of New Jersey, having offices at Passaic County Administration Building, 317 Pennsylvania Avenue, Paterson, New Jersey, which has as its principal purpose the provision of services, including advocacy, information, referral and support for handicapped persons in Passaic County and the State of New Jersey.

Id. The complaint did not even allege that the advocacy group had members, let alone that its members had suffered injury as a result of the challenged governmental action. Given the plaintiff association's failure "to identify a single member" of the association, the Court could not ascertain whether "any of [the association's] members has suffered an injury sufficient to confer standing." *Id.*; *see also Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 335 (D.N.J. 2003) (holding organization dedicated to enforcement of Americans with Disabilities Act lacked standing to bring suit on behalf of its members for denial of handicapped access to restaurants given failure "to identify which members visited which restaurants on which dates and when such members plan to return") (citing *Kessler*, 876 F. Supp. at 656). Clearly, the district court in *Kessler* was grappling with whether the plaintiff association had any members who had standing in their own right. That is not the case here. Plaintiffs' allegations and sworn declarations are sufficient to demonstrate that FAIR's members have suffered harm sufficient to confer standing in their own right. The Government's

argument places undue emphasis on language requiring plaintiff associations to "identify" or "name" members. Such language in the cited authorities goes not to a blanket rule that associations seeking to bring suit on behalf of their members must identify their membership, but rather to whether the factual allegations in a given context sufficiently demonstrate that an association indeed has members that have suffered an injury-in-fact.

Even if FAIR were obligated to identify a member to establish associational standing, it has done so. Plaintiffs' Second Amended Complaint names two members of FAIR—Golden Gate University School of Law ("Golden Gate Law") and the Faculty of Whittier Law School ("Whittier Law"). (Am. Compl. ¶ 7(d)). The Complaint alleges that Golden Gate Law maintains a policy against use of its career services office and facilities by discriminatory employers; that it was threatened by the DOD with a complete cutoff of federal funds if found out of compliance with the Solomon Amendment; and that, due to that threat, it suspended its policy with respect to the military. (*Id.*) Similarly, the Complaint alleges that Whittier Law faculty adopted a non-discrimination policy; that, pursuant to the school's policy, the director of career services disinvited military Judge Advocate General representatives and removed all recruiting materials from the career offices shelves; that it was threatened by the DOD with a complete cutoff of federal funds if found out of compliance with the Solomon Amendment; and that, because of the DOD's threat, it capitulated to the military's demands. (Am. Compl. ¶¶ 7(f)-(g)). The allegations concerning Golden Gate University School of Law and Whittier Law faculty are sufficient to

establish that FAIR members have standing in their own right to bring this action.

The Court also rejects the Government's argument that the named FAIR members do not have standing in their own right because there is no allegation that, as mere components of a larger parent university, the schools are "entitled" to bring suit on their own behalf, "potentially against the wishes of the parent institution." In support of that proposition the Government cites only to the *Hunt* requirement that members have standing in their own right. That requirement goes to whether members satisfy the injury, causation, and redressability factors for Article III standing, and not to whether members have either the capacity to bring suit or the blessings of their respective parent institutions to do so. *See Felson v. Miller*, 674 F. Supp. 975, 977-78 (E.D.N.Y. 1987) (explaining difference between standing and capacity to sue). The Court declines to impose the capacity requirement requested by the Government for purposes of standing.

The Government further argues that FAIR members lack standing because the decision to comply with the Solomon Amendment was not made by the law schools, alone, but by their parent institutions. The Court disagrees. Plaintiffs' Second Amended Complaint specifically alleges that "[a]s a direct result of the Solomon Amendment, or the DOD's interpretation and application of the Solomon Amendment, every FAIR member has entirely suspended the application of its non-discrimination policy to military recruiters." (Am. Compl. ¶ 7(h)). The decision to suspend the non-discrimination policies, even if at the direction of a parent university, was made in direct response to the Solomon Amendment. In any event, the vast majority of law

schools that suspended their policies did so by vote of the law school faculty. (Rosenkranz Decl. Opp'n Gov't 2nd Mot. to Dismiss ¶ 6).

Finally, the Court rejects the Government's argument that the law schools do not satisfy the prudential requirement of standing that a party cannot rest its claim on the legal rights or interests of third parties. *See Warth*, 422 U.S. at 499, 95 S. Ct. 2197. As Plaintiffs correctly point out, the Government's argument confuses penalty with injury. The alleged injury in this case is that of the law schools being forced to abandon policies of non-discrimination. As such, the law schools are asserting their own rights and not the rights of their parent institutions. That a law school might choose to abandon its policy, in part, because it does not want its parent institution to suffer a loss of funding, does not alter the nature of the injury suffered by the law school. Nor does it follow that theoretical standing on the part of parent universities somehow forecloses standing of law schools in their own right.

The Court concludes that the factual allegations concerning FAIR and its membership are sufficient to establish that FAIR members have standing in their own right, and FAIR need not identify the remainder of its membership at this juncture.[7] Accordingly, prong one of the test for associational standing is satisfied. *See Hunt*, 432 U.S. at 343, 97 S. Ct. 2434.

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[7] The Court does not reach the issue of whether First Amendment rights of association will protect FAIR from revealing its membership list later in this litigation. *See, e.g., Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 103 S. Ct. 416, 74 L.Ed.2d 250 (1982); *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L.Ed.2d 231 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L.Ed.2d 1488 (1958).

The Government does not dispute that FAIR has satisfied the germaneness prong of associational standing, and the Court so concludes. *See Hunt*, 432 U.S. at 343, 97 S. Ct. 2434. FAIR's stated mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." (Am. Compl. ¶ 7(a)). Its members "recognize and agree that the non-discrimination policies of each of its members is central to their missions." (*Id.*). The interests FAIR seeks to protect in this suit—the right of law schools to adhere to their non-discrimination policies—are on all fours with FAIR's stated purpose. The Court accordingly finds the germaneness prong satisfied.

FAIR also satisfies the third requirement of associational standing, that members' individual participation is not necessary. *See Hunt*, 432 U.S. at 343, 97 S. Ct. 2434. The Third Circuit has held that there is no need for individual member participation where, as here, only injunctive and declaratory relief is sought. *Roe v. Operation Rescue*, 919 F.2d 857, 865-66 (3d Cir. 1990); *see also Hospital Council of Western Pa. v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) (noting that the Supreme Court has consistently held that requests by associations for declaratory and injunctive relief do not require participation by individual association members). Yet, the Government argues that Plaintiffs' as-applied challenge to the Solomon Amendment requires individualized participation to the extent that Plaintiffs assert that "the military has demanded that law schools actively disseminate the military's literature and make arrangements for military recruiters," that recruiters have "threaten[ed] harsh sanctions for conduct that is not at all apparent on the statute's face,"

and that the military has failed to "offer[ ] any guidance or consistency as to what will be permitted." Those claims, the Government contends, necessarily require participation of the particular schools in question and an evaluation of the specific factual circumstances alleged to have occurred. The Court disagrees.

The Government misconstrues the nature of Plaintiffs' as-applied challenge. Plaintiffs' as-applied challenge is not that there is something unconstitutional about the manner in which the Government is applying the Solomon Amendment to a particular institution. It is that the Government is applying a statute and its implementing regulations to almost every law school in the nation in a way that violates the law schools' First Amendment rights. So viewed, Plaintiffs as-applied challenge does not require individualized determinations. The Court is satisfied that resolution of the claims asserted herein and the relief requested do not require participation of individual FAIR members.

B. SALT, LAW PROFESSORS, LAW STUDENT ASSOCIATIONS, & LAW STUDENTS

The Government challenges the standing of the law professors and law students for failure to satisfy the injury-in-fact and causation requirements. Specifically, the Government argues that the Solomon Amendment affects only funds flowing to institutions, not to professors or students, and does not prevent any individual from expressing disagreement with the statute or the military's policy regarding homosexual conduct. The Government further argues that the alleged injury to law professors and students amounts to stigmatic or dignitary injury, without personal harm, that is insufficient to confer standing. Finally, the Government argues that the harm to students and law professors is not directly traceable to the Solomon Amendment insofar as it resulted from the schools' independent choice to suspend their non-discrimination policies.

Plaintiffs respond that law professors and students do not claim to be silenced by the Solomon Amendment, nor do they claim to be harmed due to a generalized objection to the Government's message. The law professors and law students are suing because "the Government is interfering with a learning environment that law schools constructed for [their] benefit." (Plaintiffs' Reply Br. at 4). Plaintiffs further argue that the alleged harm to students and law professors is directly traceable to the Government's conduct because, but for the Solomon Amendment, the law schools would not have suspended their respective non-discrimination policies.

Like FAIR, SALT and the Law Student Associations must demonstrate that (a) their members would otherwise have standing to sue in their own right; (b) the interests they seeks to protect are germane to their purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343, 97 S. Ct. 2434. The parties have not briefed associational standing of SALT and the Law Student Associations. As noted, the Government challenges standing of those organizations only insofar as it argues that the professors and students lack standing in their own right. Because it is incumbent on this Court to determine that standing exists, the Court will analyze each of the factors for associational standing of SALT and the Law Student Associations. *Chong v. District Dir., Immigra-*

tion & Naturalization Serv., 264 F.3d 378, 383 (3d Cir. 2001) ("[C]ourts must decide Article III standing issues, even when not raised by the parties, before turning to the merits.") (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998)).

1. SALT

SALT is an organization of law professors from various law schools throughout the nation. (Am. Compl. ¶ 8). The law schools where SALT members teach have implemented non-discrimination policies that allow law professors to "pursue scholarly goals and prepare their students for the practice of law in an atmosphere that encourages debate, celebrates diversity and promotes the ideals of respect and tolerance within their communities." (Am. Compl. ¶¶ 8(a),(b)). Plaintiffs allege that SALT members are "both beneficiaries and recipients of the messages of non-discrimination sent by the policies and they are harmed by their respective law schools' suspension of" those policies. (Am. Compl. ¶ 8(e)). The alleged injury to SALT members is that, due to the Solomon Amendment, they are unable to benefit from the enriched pedagogical environment created by non-discrimination policies. (Am. Compl. ¶¶ 8(c)-(e)). SALT members who were instrumental in the development and implementation of non-discrimination policies at their respective law schools claim an additional injury of no longer being able to send their schools' message free from interference due to the Solomon Amendment. (Am. Compl. ¶ 8(f)). In short, SALT members claim that they are being denied "the fulfillment of [their] educational mission and the meaningful exercise of [their] own rights of academic freedom." (Johnson Reply Decl. ¶ 7).

Whether SALT members have standing in their own right turns on whether they have alleged an injury-in-fact fairly traceable to the Solomon Amendment that is likely to be redressed by a favorable judicial decision. *See Warth*, 422 U.S. at 501-02, 95 S. Ct. 2197; *Lujan*, 504 U.S. at 560-61, 112 S. Ct. 2130. It is well settled that the Constitution protects the exchange of information, both as to the speaker and the intended recipient. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) ("[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both."); *Board of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 867, 102 S. Ct. 2799, 73 L.Ed.2d 435 (1982) ("[T]he Constitution protects the right to receive information and ideas."); *Lamont v. Postmaster General*, 381 U.S. 301, 305-06, 85 S. Ct. 1493, 14 L.Ed.2d 398 (1965) (recognizing right to receive publications free from government interception); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S. Ct. 2576, 33 L.Ed.2d 683 (1972) (recognizing right to "receive information and ideas" as being "nowhere more vital than in our schools and universities"). SALT members allege an intrusion on their right to receive, benefit from, and, in some cases, send information—the law schools' message of non-discrimination. That injury is unlike the vague and generalized concerns held insufficient to support standing in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982) (psychological consequence of disagreeing with governmental conduct) and *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 616, 109 S. Ct. 2037, 104 L.Ed.2d 696 (1989) (teachers association members' "special interest in the quality of education").

The Court concludes that SALT members have alleged a sufficiently concrete and particularized harm to their right to receive, benefit from, and, in some cases, send the message of non-discrimination.

Next, it must be determined whether the alleged harm to SALT members is fairly traceable to the Solomon Amendment or, as the Government argues, is due to an independent decision on the part of the law schools that breaks the chain of causation. Particularly on point is *Pitt News v. Fisher*, 215 F.3d 354 (3d Cir. 2000). There a student newspaper sued the Attorney General of the State of Pennsylvania to enjoin enforcement of a state statute that imposed criminal penalties on businesses that advertised alcoholic beverages in materials "published by, for or in behalf of any education institution." *Id.* at 357. The Attorney General challenged the student newspaper's standing on the ground that its alleged injury—reduction in advertising revenues—was caused by the advertisers' independent decision not to purchase advertising for fear of criminal prosecution, not the statute itself. *Id.* at 360-61. The Third Circuit disagreed, reasoning that the newspaper's injury was traceable to the statute because the advertisers would not have ceased purchasing advertisements in the student newspaper but for the challenged statute. *Id.* Likewise, the chain of causation is not broken here because the law schools would not have suspended their non-discrimination policies as to military recruiting but for the Solomon Amendment. The Court concludes that the alleged harm to SALT members is fairly traceable to the Solomon Amendment.

SALT members also meet the redressability requirement for standing. The alleged harm to SALT

members—governmental intrusion on their right to receive, benefit from, and, in some cases, send the message of non-discrimination—would be redressed were enforcement of the Solomon Amendment to be enjoined and the schools reinstated their respective non-discrimination policies as to the military. The Court accordingly finds that SALT has alleged facts sufficient to establish that its member law professors have standing in their own right.

The Government does not dispute that SALT satisfies the germaneness and individual participation prongs of associational standing, and the Court finds that those factors are met. According to the Declaration of SALT's co-president, Michael Rooke-Ley, SALT is dedicated to "enhanc[ing] the quality of legal education, and extend[ing] the power of law to underserved individuals and communities." (Rooke-Ley Decl. ¶ 3). Consistent with that mission, members of SALT have been instrumental in requiring law schools to adhere to non-discrimination policies as a way to combat discrimination in the legal profession. (*Id.* ¶ 4). SALT members consider the non-discrimination policies, and the values expressed by those policies, to be central to their mission and their role as law professors. (*Id.* ¶ 6). The germaneness prong is satisfied because SALT's mission is sufficiently broad to encompass the interests championed in this suit.

Finally, this litigation does not demand or depend on the individual participation of SALT members. No case-by-case determination need be made as to individual professors. And, as previously noted, the Third Circuit has held that there is no need for individual member participation where, as here, only injunctive and

declaratory relief is sought. *Roe*, 919 F.2d at 865-66; *Hospital Council of Western Pa.*, 949 F.2d at 90.

2. Law Professors

Just as SALT members have standing to bring this action, so too do the Law Professors. Erwin Chemerinsky and Sylvia Law, as faculty members of USC Law and NYU Law, respectively, are beneficiaries, senders, and recipients of the message of non-discrimination sent by their schools' non-discrimination policies. (Am. Compl. ¶ 11). The Law Professors allege that they can no longer send or receive the messages of non-discrimination due to the Solomon Amendment. (*Id.*). For reasons discussed *supra*, the alleged harm to professors is sufficient to confer standing to bring this action.

3. Law Student Associations

The Government challenges the standing of the Law Student Associations primarily on the basis that students do not have standing in their own right. Specifically, the Government argues that students are not directly affected by the Solomon Amendment, they have not otherwise alleged a legally cognizable injury, and that any harm to the students is the result of the law schools' independent choice to comply with the Solomon Amendment, not the statute itself. Plaintiffs respond that students, as beneficiaries of law school policies directed at increasing diversity, inculcating values, and fostering an environment of open and respectful debate, are harmed to the extent that they can no longer receive the educational messages sent by their law schools.

Plaintiffs CFE and RGLC are student associations at Boston College Law School and Rutgers University

School of Law, respectively. (Am. Compl. ¶ 9). CFE was formed in direct response to Boston College Law School's capitulation to military threats of a funding cut-off; specifically, the faculty's September 2002 decision to suspend the school's non-discrimination policy as it applied to sexual orientation and to permit the military to recruit on campus with the assistance of the school's career services office. (Smolik Decl. ¶ 1). CFE has distributed symbolic ribbons, circulated petitions urging the faculty to reinstate the non-discrimination policy, held discussion groups, sought to educate others about the Solomon Amendment, and held rallies during on-campus military recruitment visits. (Smolik Decl. ¶ 2). The record discloses no comparable particulars about the genesis of RGLC, revealing only that both organizations "are committed to furthering the rights and interests of all groups including gays and lesbians." (Am. Compl. ¶ 9).

The Court will first consider whether Student Association members have standing in their own right to bring this action. Members of the Law Student Associations are student beneficiaries of law school non-discrimination policies who allege that the Solomon Amendment interferes with their right to receive educational messages sent by their respective law schools. (*Id.*). Instructive on that point is *N.J.-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Bd. of Higher Ed.*, 654 F.2d 868, 878 (3d Cir. 1981), where the Third Circuit recognized a right of students to acquire knowledge. In that case students alleged infringement of their First Amendment right "in education to express, transmit and receive ideas" by virtue of the licensing requirements imposed on institutions of higher education by

New Jersey law. *Id.* at 871. The Third Circuit recognized students' rights as listeners:

> The Supreme Court has held that the "opportunities of pupils to acquire knowledge," is a first amendment right distinct from the right to impart knowledge. *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 67 L.Ed. 1042 (1923). Moreover, the Court has recently emphasized that the distinct "first amendment right 'to receive information and ideas' . . . . is nowhere more vital than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S. Ct. 2576, 33 L.Ed.2d 683 (1972). . . . Supreme Court precedent clearly indicates that the students have distinct rights which may be enforced. . . .

Id. at 878. Clearly, students have a legally cognizable right to receive information and messages sent by their schools. The Court concludes that law student members have alleged a legally cognizable injury sufficient to satisfy the injury-in-fact requirement of standing.

Next, it must be determined whether the alleged harm to student members' rights is "fairly traceable" to the Solomon Amendment. *Lujan*, 504 U.S. at 560, 112 S. Ct. 2130. For reasons discussed *supra*, the alleged harm to law students is fairly traceable to the Solomon Amendment. *See Pitt News*, 215 F.3d 354. There is little doubt that, but for the Solomon Amendment, law school non-discrimination policies would have remained in effect. Nor is there any doubt that the harm to students would be redressed if enforcement of the Solomon Amendment were enjoined. With the injury-in-fact, causation, and redressability requirements established, the Court finds that student members of

CFE and RGLC have standing in their own right to bring this action.

Next, it must be determined whether the Law Student Associations satisfy the germaneness and individual participation prongs of associational standing. The stated purpose of the Law Student Associations—to further the interests and rights of all groups, including gays and lesbians—is concededly broad. However, that purpose does encompass vindication of student rights to benefit from the pedagogical environment created by non-discrimination policies. *See Hospital Council of Western Pa.*, 949 F.2d at 88 (rejecting argument that association cannot satisfy germaneness requirement unless its purpose is narrow or specific). The record demonstrates that CFE was created in direct response to suspension of the law school's non-discrimination policy as to the military. Thus, the Court is satisfied that its purpose is germane to the interests championed herein. Likewise, RGLC's commitment to furthering the interests of gays and lesbians necessarily encompasses the objections raised herein—i.e., conflict between law school non-discrimination policies and military's discriminatory practices concerning homosexual conduct. The Court is satisfied that there is a sufficient theoretical identity of interest between law student members and both Law Student Associations to satisfy the germaneness prong of associational standing.

Lastly, the Court finds that the Law Student Associations satisfy the individual participation prong. This case does not demand any fact-sensitive determinations concerning individual members of the Law Student Associations. The Law Student Associations can fully represent their members' interests. More-

over, as already noted, the injunctive and declaratory relief requested does not require individual member participation. *Roe*, 919 F.2d at 865-66; *Hospital Council of Western Pa.*, 949 F.2d at 90.

The Court accordingly concludes that the Law Student Associations have standing to bring suit on behalf of their student members.

4. Law Students

Plaintiff Law Students, as "beneficiaries of law school policies increasing diversity and directed at inculcating values and fostering an environment in which respectful debate unfolds," allege harm to their right to receive educational messages sent by their law school due to the Solomon Amendment. (Am. Compl. ¶ 10). For reasons discussed *supra*, the Court concludes that alleged governmental interference with a message sent by academic institutions to their students amounts to an invasion of the students' legally protected interests that is fairly traceable to the Solomon Amendment. The Court also finds a likelihood of redress to the Law Students were enforcement of the statute enjoined. The Court accordingly concludes that the Law Students have standing to bring this action.

III. Conclusion

For the foregoing reasons, the Government's Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Standing will be denied as to all plaintiffs.

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

To obtain preliminary injunctive relief Plaintiffs must establish four well-settled conditions: (1) a "reasonable likelihood" of success on the merits; (2) a likelihood of "irreparable harm" absent the relief sought; (3) the harm to plaintiffs by denying preliminary injunctive relief outweighs the harm to the government by granting such relief; and (4) preliminary injunctive relief would serve the public interest. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002), cert. denied, *Borough of Tenafly v. Tenafly Eruv Ass'n, Inc.*, 539 U.S. 942, 123 S. Ct. 2609, 156 L. Ed.2d 628 (2003). The inquiry as to likelihood of success on the merits of Plaintiffs' constitutional claims, to which the Court now turns, is a separate inquiry from the threshold determination of Article III standing. That is, "[a] party may demonstrate standing to litigate a claim even if they fail to make out a constitutional violation on the merits." *Pitt News*, 215 F.3d at 360, 361 n. 4. It follows that the Court's conclusion as to standing is not determinative of whether Plaintiffs have established a likelihood of success on the merits of their constitutional claims. The parties have not separately addressed the First Amendment claims of the law students and law professors in connection with the preliminary injunction request, though their standing arguments are extensive, and the Court will not do so in the analysis that follows. In any event, the students and law professors are entitled to no greater protection than the law schools whose interests are most directly implicated by the Solomon Amendment.

The ultimate question presented is whether the Solomon Amendment is likely to withstand constitutional scrutiny. Plaintiffs contend that the Solomon Amendment is constitutionally infirm because it conflicts with law school recruiting policies, which are "saturated with First Amendment value" and lie at the

intersection of three distinct First Amendment rights (academic freedom, freedom of expressive association, and free speech). Plaintiffs' position is that application of three distinct constitutional doctrines (the doctrine of unconstitutional conditions, the prohibition against viewpoint discrimination, and the void-for-vagueness doctrine) compels a finding of unconstitutionality. The Government disagrees and relies heavily on Congress' broad power under the Spending Clause and its constitutional mandate to raise and support armies.

This case raises multiple issues of constitutional law, so for clarity the Court will briefly set forth the structure of its analysis. First, the Court will address whether the Solomon Amendment creates an unconstitutional condition by forcing law schools to abandon their First Amendment rights on pain of losing federal funding, and thereby impinges on the First Amendment rights of the law schools and other plaintiffs. Typically, Congress has wide latitude in imposing conditions on the receipt of federal funding. This wide latitude, though, is not without bounds, and traditional Spending Clause analysis will not suffice in situations where, as here, there is tension between the spending power and the First Amendment. Where the exercise of the spending power implicates First Amendment interests, the doctrine of unconstitutional conditions becomes applicable and holds that the government cannot condition a benefit on the relinquishment of a constitutional right. Thus, the Court will examine the substance of the conditions imposed by the Solomon Amendment and their impact on First Amendment rights. The Court notes, however, that the Solomon Amendment does not directly restrict speech, making

this case factually different from prior cases applying the doctrine of unconstitutional conditions.

Second, the Court will address Plaintiffs' contention that the Solomon Amendment discriminates on the basis of viewpoint by promoting a pro-military recruiting message and punishing only those schools that exclude the military because of their belief that the military's recruiting policy is a moral wrong.

Finally, the Court will examine the Solomon Amendment and its implementing regulations to determine if they are unconstitutionally vague.

I. The Unconstitutional Conditions Claim

A. Facial v. As-Applied Challenges

The Court begins its analysis by considering Plaintiffs' argument that the Solomon Amendment is unconstitutional, both facially and as applied. Plaintiffs argue that this case includes a facial challenge because Congress cannot command law schools even to admit the military to campus to "disseminate its recruiting message so long as that message is anathema to their mission and undermines their expressive goals." As framed by Plaintiffs, the as-applied challenge to the Solomon Amendment focuses on the manner in which the military has been interpreting the statute, *i.e.*, requiring law schools to provide affirmative assistance to military recruiters. It is clear that the alleged interference with Plaintiffs' First Amendment interests is comparatively greater in the as-applied situation because the potential entanglement with the military is greater when law schools are required to provide affirmative assistance to military recruiters than it is when they are only required to allow military recruiters

on campus. However, the Court need not linger on the difference between the facial and as-applied challenges because it rejects Plaintiffs' contention that the Solomon Amendment is unconstitutional as applied. To the extent the Solomon Amendment may require law schools to offer affirmative assistance to military recruiters, the alleged intrusion on Plaintiffs' First Amendment interests still falls short of a constitutional violation. And if the Solomon Amendment survives the as-applied challenge, it follows that it survives the facial challenge as well since the alleged infringement on Plaintiffs' First Amendment interests resulting from the mere presence of military recruiters on campuses is even less. Put another way, if the Solomon Amendment can be applied constitutionally, Plaintiffs' facial challenge must fail. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987) (holding that a facial challenge to constitutionality of a statute will only succeed if a plaintiff can "establish that no set of circumstances exists under which the Act would be valid"). With this distinction in mind, the Court will analyze Plaintiffs' as-applied challenge.[8]

[8] For purposes of Plaintiffs' as-applied First Amendment challenge, the Court accepts the DOD's proposed interpretation of the Solomon Amendment, *i.e.*, requiring the affirmative assistance of the law schools. However, as a matter of statutory construction, the Court has serious reservations as to the DOD's interpretation. See discussion *infra* in Section III.

B. The Spending Clause

As this matter concerns a congressional attempt to attach certain conditions to the receipt of federal funds, and not a regulatory restriction, the Spending Clause is the appropriate starting point for assessing the constitutionality of the Solomon Amendment. The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L.Ed.2d 171 (1987) (internal citations and quotation marks omitted). The Supreme Court has repeatedly emphasized that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 2303, 156 L.Ed.2d 221 (2003) (citing *Dole*, 483 U.S. at 206, 107 S. Ct. 2793); *see also Rust v. Sullivan*, 500 U.S. 173, 197-98, 111 S. Ct. 1759, 114 L. Ed.2d 233 (1991). Of particular import here, the constitutional limitations on Congress when it exercises its spending power "are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 209, 107 S. Ct. 2793. There is, therefore, a basic difference between a federal spending program and a federal regulatory program. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 551, 121 S. Ct. 1043, 149 L. Ed.2d 63 (2001) (Scalia, J., dissenting) (citing *Maher v.*

Roe, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977)).

In addition, it is evident that the Solomon Amendment furthers important policy objectives. The Constitution empowers Congress to "raise and support Armies," U.S. Const. art. I, § 8, cl. 12, and "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). The salient issue, then, is whether Congress has rightly exercised its broad power under the Spending Clause to achieve the policy objective of maintaining an effective military through on-campus recruiting efforts. Proper resolution of this issue, however, compels an inquiry that goes beyond traditional Spending Clause analysis.

C. Intersection Between Spending Clause and First Amendment

Notwithstanding the wide latitude afforded to Congress to set spending priorities, the congressional spending power is not unlimited; other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Dole*, 483 U.S. at 208, 107 S. Ct. 2793. Plaintiffs are thus correct in pointing out that the Spending Clause cannot categorically trump the Bill of Rights. *See Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958) (veteran's tax benefit cannot be conditioned on loyalty oath); *FCC v. League of Women Voters*, 468 U.S. 364, 370-71, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (grant of federal funds to broadcasting stations cannot require that stations refrain from editorializing); *see also Finley*, 524 U.S. at 571, 118 S. Ct. 2168 (noting that

First Amendment has application in subsidy context). Traditional Spending Clause analysis does not apply in situations where the spending power clashes with First Amendment rights. In those circumstances, the doctrine of unconstitutional conditions, which holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, circumscribes the otherwise broad reach of the spending power. *See Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972).

Plaintiffs argue that the Solomon Amendment violates the doctrine of unconstitutional conditions because it forces law schools to abandon their constitutionally-protected academic freedom and their speech and associational rights to avoid a cut-off of federal funding. Defendants respond that the Solomon Amendment does not impose an unconstitutional condition on any institution's protected First Amendment rights because it is not conditioned on, or related to, speech; or alternatively, if the Solomon Amendment does affect speech, the effect is incidental. Defendants therefore argue that the Solomon Amendment is a valid exercise of the Spending Clause.

Prior cases discussing the doctrine of unconstitutional conditions fail to provide a controlling framework for assessing the Solomon Amendment's constitutionality. A review of those cases reveals that the Supreme Court was guided by two overarching principles, neither of which bear directly on this case, as the Solomon Amendment does not directly target speech or, as will be seen, discriminate on the basis of viewpoint.

First, when the Government appropriates public funds to establish a program it is entitled to define the

limits of that program. *Rust*, 500 U.S. 173, 111 S. Ct. 1759; *American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297. In *Rust*, the Supreme Court rejected a First Amendment free-speech challenge to a federal funding scheme for family planning services which denied such funds to any program providing abortion counseling. 500 U.S. at 192, 111 S. Ct. 1759. The Court noted that the Government can, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way." *Id.* at 193, 111 S. Ct. 1759. Similarly, in *American Library Ass'n*, the Supreme Court held that the Children's Internet Protection Act ("CIPA") did not impose an unconstitutional condition on public libraries. 539 U.S. at ——, 123 S. Ct. at 2307. CIPA denied public libraries federal funding to provide Internet access unless they installed software to block obscene or pornographic images. In rejecting the unconstitutional conditions claim brought by the recipients of these funds, the Court stated that "'the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized.'" 539 U.S. at ——, 123 S. Ct. at 2308 (quoting *Rust*, 500 U.S. at 196, 111 S. Ct. 1759). Because the Government spending program was limited in both *Rust* and *American Library Ass'n*, the Government could constitutionally "make a value judgment . . . and . . . implement that judgment by the allocation of public funds." *Rust*, 500 U.S. at 192-93, 111 S. Ct. 1759 (citations omitted). Put differently, the Government may make viewpoint-based funding decisions in instances in which the Government itself is the speaker. *Velazquez*, 531 U.S. at 541, 121 S. Ct. 1043.

Although both *Rust* and *American Library Ass'n* stand for the proposition (advanced by the Government) that the Government has wide latitude in conditioning the receipt of federal funds even in circumstances implicating First Amendment rights, they addressed narrow spending programs. Here, there is no Government spending "program" as in *Rust* or *American Library Ass'n*. The funds at issue under the Solomon Amendment are those flowing from certain parts of the Government to any higher education institution for various purposes. While that distinction distances this case from *Rust* and *American Library Ass'n*, it does not compel the conclusion (advanced by Plaintiffs) that the Solomon Amendment transgresses the wide latitude granted Congress in both those cases. Both cases are factually distinct in another way. Within the scope of the spending programs in those cases, the governmental interference with a well-defined constitutional right was direct and categorical. Indeed, particular viewpoints which were contrary to the Government's value judgments were entirely suppressed. The Solomon Amendment, by contrast, does not directly or entirely exclude a point of view. For reasons discussed in more detail below, the Solomon Amendment's interference with speech and other protected rights is incidental. As such, the Court concludes that the principles established in *Rust* and *American Library Ass'n*, although instructive, cannot be squarely applied to the Solomon Amendment.

Second, the government cannot use its funds in a way that is "aimed at the suppression of ideas thought to be inimical to the Government's own interest." *Velazquez*, 531 U.S. at 549, 121 S. Ct. 1043 (prohibiting legal services funding to any organization that represented

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clients in effort to amend or otherwise challenge existing welfare law); *Speiser*, 357 U.S. 513, 78 S. Ct. 1332 (denial of tax exemption for engaging in proscribed speech); *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550, 103 S. Ct. 1997, 76 L. Ed.2d 129 (1983). Where the Government itself does not speak or subsidize transmittal of a message it favors, viewpoint-based distinctions are improper. *Velazquez*, 531 U.S. at 548-49, 121 S. Ct. 1043; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995) (university created limited public forum by subsidizing student fund, from which it impermissibly excluded religious publications); *see also American Library Ass'n*, 539 U.S. at —— n. 7, 123 S. Ct. at 2309 n. 7. These cases involved the direct suppression of ideas, through the withholding of funding, tax benefits or subsidies from those who would express those ideas. Whether these cases are controlling depends on whether the Solomon Amendment suppresses speech or substantially inhibits the exercise of other protected rights.

The Court believes that the principles established in prior cases applying the doctrine of unconstitutional conditions are too fact-specific to provide an easy or appropriate avenue for analyzing the novel constitutional issues raised by the Solomon Amendment. Law school recruiting policies have First Amendment value and the Solomon Amendment has an effect on Plaintiffs' First Amendment interests. However, at the intersection between the Spending Clause and the First Amendment, the mere presence of a constitutionally protected interest does not render the Solomon Amendment unconstitutional.

A finding of an unconstitutional condition presupposes that there is a relinquishment of a constitutional right. *See Perry*, 408 U.S. at 597, 92 S. Ct. 2694 (noting that if government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited). In other words, the Solomon Amendment, as an exercise of the congressional spending power, will not create an unconstitutional condition unless the alleged infringement on Plaintiffs' First Amendment interests rises to the level of a constitutional violation. This determination, given the fact that First Amendment jurisprudence resists generalities and usually requires delicate balancing, requires the Court to carefully examine the First Amendment rights at issue here and the Solomon Amendment's impact thereon. For the reasons explained herein, the Solomon Amendment does not transgress constitutional boundaries.

D. First Amendment Interests

1. Academic Freedom

Plaintiffs aver that a law school's policy of nondiscrimination—and its application of that policy to employer recruiting—has pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures and by helping to nurture an environment conducive to free and open discourse. They argue that if academic freedom means anything, it means that the decision as to what to teach is the law schools' to make, without governmental interference. But as Justice O'Connor opined in a different First Amendment context, "reliance on categorical platitudes is unavailing." *Rosenberger*, 515 U.S. at 847, 115 S. Ct. 2510 (O'Connor, J., concurring). Like most freedoms,

the right to academic freedom is not absolute. *See Barenblatt v. U.S.*, 360 U.S. 109, 112, 79 S. Ct. 1081, 3 L.Ed.2d 1115 (1959).

The constitutional importance of academic freedom has long been recognized. *See Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 2339, 156 L.Ed.2d 304 (2003); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603, 87 S. Ct. 675, 17 L.Ed.2d 629 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L.Ed.2d 1311 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 195, 73 S. Ct. 215, 97 L.Ed. 216 (1952) (Frankfurter, J., concurring); *see also Board of Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 237 n. 3, 120 S. Ct. 1346, 146 L.Ed.2d 193 (2000) (Souter, J., concurring). It is true that the Court must give "a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Grutter*, 539 U.S. at ——, 123 S. Ct. at 2339 (holding that student body diversity is a compelling state interest that can justify use of race in university admissions). However, a university is not impervious to competing societal interests. *Barenblatt*, 360 U.S. at 112, 79 S. Ct. 1081 (noting that an "educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls"). That such institutions occupy a "special niche in our constitutional tradition" implies that they remain part of, and not sovereign to, that constitutional tradition. *Grutter*, 539 U.S. at ——, 123 S. Ct. at 2339. An educational institution should not be able to erect an insurmountable or impenetrable wall

against opposing public interests. Rather, the interests of educational institutions to shape their own pedagogical environments must be considered in proper context and not in disregard of any controlling facts or competing interests. *See id.* at 2338 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960) ("admonishing that 'in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts' ")).

The difficulty in evaluating the constitutional significance of Plaintiffs' claim to academic freedom is that the precise contours of this First Amendment interest are somewhat unclear. The concept of academic freedom seems to be inseparable from the related speech and associational rights that attach to any expressive organization or entity. To be sure, cases involving academic freedom have almost exclusively dealt with direct and serious infringements on individual teachers' speech or associational rights. *Southworth*, 529 U.S. at 237 n. 3, 120 S. Ct. 1346; *see also Wieman*, 344 U.S. 183, 73 S. Ct. 215 (state statute requiring state employees to take loyalty oath that they are not affiliated with subversive organizations); *Sweezy*, 354 U.S. 234, 77 S. Ct. 1203 (investigation by state attorney general into professor's political ideology and content of classroom lectures); *Shelton*; 364 U.S. 479, 81 S. Ct. 247, 5 L.Ed.2d 231 (state statute requiring teachers to file affidavits giving names and address of all organization to which they had belonged); *Keyishian*, 385 U.S. 589, 87 S. Ct. 675 (state statute requiring removal of teachers based

on treasonable or seditious words). The Solomon Amendment, unlike the statutes at issue in those cases, cannot be said to "cast a pall of orthodoxy over the classroom," because professors remain free to speak and teach as they please. *Keyishian*, 385 U.S. at 603, 87 S. Ct. 675. The Solomon Amendment, on its face, does not interfere with academic discourse by condemning or silencing a particular ideology or point of view. While the Solomon Amendment undoubtedly interferes with law school recruiting policies, the effect on speech and associational rights is more attenuated than in the cases just cited. Thus, notwithstanding the broad acknowledgment of the constitutional importance of academic freedom, those cases fail to provide the Court with an independent path to review an alleged infringement on the right to academic freedom; which is to say, without reference to the related and attendant rights of free expression.

For purposes of the Court's analysis in this case, the right to academic freedom is not cognizable without a foundational free speech or associational right. If the Solomon Amendment violates Plaintiffs' right to academic freedom, it is because it also intrudes on their rights to free speech and expressive association. Accordingly, the Court will turn its attention to those First Amendment rights.

2. Free Speech and Associational Rights

Plaintiffs argue that the law schools' rights are not different from the First Amendment rights of free speech and expressive association that attach to any organization with an expressive purpose. In *Boy Scouts of America v. Dale*, the Supreme Court held that a state law requiring the Boy Scouts to accept an

avowed homosexual and gay rights activist as an assistant scoutmaster violated the Boy Scouts' First Amendment right of expressive association. In so holding, the Court articulated a three-step process to analyze a group's expressive association claim. 530 U.S. 640, 648, 120 S. Ct. 2446, 147 L.Ed.2d 554 (2000). First, the Court considered whether the group making the claim engaged in expressive association. *Id.* Second, the Court analyzed whether the governmental action at issue significantly affected the group's ability to advocate public or private viewpoints. *Id.* at 653, 120 S. Ct. 2446. Lastly, the Court weighed the governmental interest implicated in the action against the burden imposed on the associational expression to determine if the governmental interest justified the burden. *Id.* at 656, 120 S. Ct. 2446 (noting that freedom of expressive association is not absolute); *see also Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2000) (applying three-step process to expressive association claim of university fraternity chapter). To succeed on an expressive association claim, a group must satisfy all three prongs. *See Dale*, 530 U.S. at 656, 120 S. Ct. 2446.

(a) Expressive Association

As the Third Circuit has recognized, "[t]he Supreme Court has cast a fairly wide net in its definition of what comprises expressive activity." *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 443. The First Amendment's protection of expressive association extends beyond pure advocacy groups. A group must merely engage in some form of expression, whether it be public or private, that could be impaired in order to be entitled to protection. *Dale*, 530 U.S. at 655, 120 S. Ct. 2446. "The expansive notions of expressive association used

in . . . *Dale* demonstrate that there is no requirement that an organization be primarily political (or even primarily expressive) in order to receive constitutional protection for expressive associational activity." *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 443. It is nevertheless incorrect to say there is no threshold for expressive activity claims; rather, there is a de minimis threshold for a finding that a group engages in expressive association. *See id.* at 444 (holding fraternity chapter did not engage in constitutionally protected expressive association). Under this liberal interpretation of expressive association, there appears to be no doubt that the law schools qualify as expressive associations entitled to constitutional protection.

In *Dale*, the Court opined that it "seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." 530 U.S. at 650, 120 S. Ct. 2446. The Boy Scouts claimed that its goal was to "instill values in young people." *Id.* at 649-50, 120 S. Ct. 2446. The record reveals that the law schools, too, seek to inculcate a certain set of values and principles in their students. Plaintiffs assert that the law schools believe that invidious discrimination on the basis of sexual orientation is a moral wrong, and that "judgments about people bearing no relation to merit harm and inhibits students, faculty, and eventually society at large." Plaintiffs further assert that their non-discrimination policies help inculcate those values. And whereas the Boy Scouts Oath and Law did not expressly mention the particular value that it claimed the government was undermining—homosexual conduct as an unacceptable form of behavior—the law schools' non-discrimination policies explicitly include sexual orientation.

Furthermore, although it could be argued that the law schools do not exist for the sole purpose of disseminating one particular viewpoint, "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment." *Id.* at 655, 120 S. Ct. 2446. It is also not fatal to the law schools' claim of expressive association that certain members of the law school community conceivably disagree with the law schools' conception of tolerance or other related moral norms. The First Amendment does not require that every member of a group agree on every issue. *Id.* The law schools have adopted official policies with respect to sexual orientation, and this is sufficient for First Amendment purposes. As such, the law schools qualify as expressive associations.

(b) Degree of Interference

Given that the law schools engage in expressive association, the inquiry turns to whether the forced inclusion on their campuses of an unwanted periodic visitor would significantly affect the law schools' ability to express their particular message or viewpoint. The Court believes it does not.

The right to freedom of speech protected by the First Amendment against state intrusion includes both the right to speak freely and the right to refrain from speaking at all. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (Murphy, J., concurring). "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977) (citing *Barnette*, 319 U.S. at 637, 63

S. Ct. 1178). Just as the First Amendment may prohibit the government from suppressing or infringing on speech, it may also prevent the government from compelling individuals to express certain views. *See id.* Within First Amendment jurisprudence, therefore, there exist two analytically independent constitutional violations: message suppression and compelled speech. Plaintiffs argue that the Solomon Amendment combines both violations. On the one hand, Plaintiffs contend that the Solomon Amendment muddles (*i.e.*, suppresses) the law schools' messages since they cannot credibly proclaim "we do not abet acts of discrimination" when they do. On the other hand, Plaintiffs also claim that the Solomon Amendment, as applied by the military, compels law schools to endorse, or even subsidize, the military's expressive effort in recruiting by assisting military recruiters.

Just as the Court must give deference to the law schools' assertions regarding the nature of their expression, the Court must also give deference to the law schools' view of what would impair that expression. *Dale*, 530 U.S. at 653, 120 S. Ct. 2446. Even so, the law schools cannot "erect a shield" against opposing public interests simply by asserting that the mere presence of an unwanted visitor would impair its message. *See id.* This degree of deference, therefore, does not preclude the Court from conducting an independent inquiry into whether the Solomon Amendment significantly intrudes on the law schools' expressive and associational interests.

(i) Message Dilution

Plaintiffs claim that the Solomon Amendment presents the same constitutional violation found in

Dale—muddling of a speaker's message. In *Dale*, the Boy Scouts asserted that homosexual conduct was inconsistent with the values embodied in the Scout Oath and Law, and that the organization did not want to promote homosexual conduct as an acceptable form of social behavior. *Dale*, an assistant scoutmaster, was co-president of a gay and lesbian organization and a vocal gay rights activist. His continued presence in the Boy Scouts, not merely as a member but as a leader, would surely force the organization to send a message, both to youth members and the world, that the Boy Scouts accepted homosexual conduct as an acceptable form of behavior. The Court thus found a "severe intrusion" on the Boy Scouts' right to freedom of expressive association. *Id.* at 660, 120 S. Ct. 2446.

Dale is distinguishable from this case. The communicative and associational effect of periodic visits of a military recruiter to a university campus or job fair is vastly different from the presence of a gay scoutmaster in the Boy Scouts, a private membership organization. The application of the state anti-discrimination law required the Boy Scouts to accept a gay rights activist not merely as a member but as an assistant scoutmaster. The significant intrusion on the Boy Scouts' associational rights did not result from the fact that they were forced to accept as a member a person with whom they disagreed. As the Supreme Court noted, "the presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with the Boy Scouts policy." *Dale*, 530 U.S. at 655-56, 120 S. Ct. 2446. There is no question that the forced inclusion of an openly gay assistant scoutmaster

would significantly undermine the Boy Scouts' ability to express its viewpoint and thereby inculcate its values in younger members. Here, the Solomon Amendment does not compel the law schools to accept the military recruiters as members of their organizations, not to mention bestow upon them any semblance of authority. Indeed, the military recruiters are actually present on campuses only a few times per year. The military recruiter, by definition, is not a member of the law school community. He or she is a visitor, and, in fact, a periodic visitor among many competing visitors. At best, the military recruiter is like the heterosexual assistant scoutmaster who disagrees with the Boy Scouts' policy; he or she does little to compromise the free speech and expressive association rights of the law schools.

The law schools are free to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters. While there is tension between the Solomon Amendment and law school recruiting policies, there are ways of relieving that tension by taking ameliorative measures to distance the law schools from the military's discriminatory policy. And notwithstanding the Solomon Amendment's effect on those policies, which are a means of inculcating the law schools' value system, there is no realistic danger, given the AALS' recommended ameliorative measures, that it will significantly compromise the law schools' ability to disseminate their messages. The law schools' anecdotal examples in evidence are said to support the argument that "[t]he message is not getting through." (Pls.' Br. Supp. Prelim. Inj. at 16-17). On the contrary, the

message of non-discrimination is at the heart of the annual controversy, and is therefore re-played and re-endorsed every time there is a controversy on any law school campus. The fact that one NYU Law student (Sweeney Decl. ¶ 15) and some other law students profess to no longer believe the message of non-discrimination does not change the fact that the message is being disseminated, loudly and clearly, as suggested by the AALS. It follows that the Court is unpersuaded that the degree of intrusion on the law schools' right to expressive association is comparable to the governmental intrusion found in *Dale*.

(ii) Compelled Speech

The Solomon Amendment merely conditions federal funds on campus and student access for military recruiting, and therefore, it is not an outright compulsion of speech. There is nothing in the record to indicate that the Solomon Amendment requires law schools to speak, in the linguistic or verbal sense, on behalf of the military recruiters or the military's alleged recruiting message. Rather, Plaintiffs argue that the Solomon Amendment compels law schools to endorse, or even subsidize, the military's expressive effort in recruiting by admitting military recruiters to campus and assisting their recruiting efforts.

Plaintiffs rely heavily on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L.Ed.2d 487 (1995), in arguing that the Solomon Amendment compels the schools to endorse the military's recruiting 'message.' In *Hurley*, the Supreme Court applied traditional First Amendment analysis in holding that a local anti-discrimination ordinance could not constitutionally be applied to com-

pel the organizers of Boston's St. Patrick's Day parade to include a gay, lesbian, and bisexual contingent ("GLIB") marching under its own banner. *Id.* at 581, 115 S. Ct. 2338. An important point in *Hurley* was that the parade organizers wanted to exclude GLIB members not because of their sexual orientation (they were free to march in the parade) but because they wanted to march behind the GLIB banner. Indeed, GLIB was formed for the very purpose of marching in the parade in order to express as a message its members' pride as openly gay, lesbian, and bisexual individuals of Irish heritage. The Supreme Court found that a parade is an inherently expressive activity, and perhaps more importantly, that GLIB's participation as a unit in the parade was "equally expressive." *Id.* at 571, 115 S. Ct. 2338. It therefore violated the First Amendment to force the parade organizers to include messages they found inimical. *Id.* at 569-70, 115 S. Ct. 2338.

The Court further noted that the anti-discrimination ordinance did not, "on its face, target speech or discriminate on the basis of its content." *Id.* at 572, 115 S. Ct. 2338. The Court stated that such laws "do not, as a general matter, violate the First and Fourteenth Amendments." *Id.* Nevertheless, given the expressive character of both the parade and the marching GLIB contingent, the Court found that the statute had been applied in a manner such as to require the parade organizers to alter the expressive content of their parade. *Id.* at 573, 115 S. Ct. 2338.

Hurley is also distinguishable from this case. To begin with, GLIB was formed to express a message. The military recruiters are not seeking access to campuses and students with the primary purpose of expressing the message that disapproval of openly gay

conduct within the armed forces is morally correct or justifiable. That some see the military only for its discriminatory policy does not support the conclusion that the military is similar to GLIB in its expressive purpose. The Solomon Amendment, on its face, reveals that the reason the military seeks access to these campuses is to recruit, *i.e.*, interview applicants and offer jobs. A recruiting function or job fair is fundamentally different from a parade in its communicative content. At the very least, a recruiting event on campus or a job fair off campus is substantially less expressive than a parade. *Compare Hurley*, 515 U.S. at 569, 115 S. Ct. 2338 (noting that "parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration") (citations omitted). The purpose of an expressive parade is to celebrate a particular ideological viewpoint. That is the obvious reason why groups having opposing viewpoints tend to have their own separate parades. As every parade also tends to have a common theme, so every contingent marching behind a banner in a parade is understood to contribute something to that theme. The content of the overall message of the parade in *Hurley* would therefore be dramatically affected by the forced inclusion of GLIB. Both the parade organizers and GLIB sought to expressly convey messages through the medium of an inherently expressive activity. The same cannot be said about the military's presence at a recruiting function.

This case resembles *Hurley* only if recruiting were held to be essentially expressive activity proclaiming the discriminatory message of the military. Plaintiffs argue that recruiting is at least as communicative as

soliciting contributions and proselytizing. However, this argument does not withstand careful inspection. As the Supreme Court has noted, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example walking down the street or meeting one's friends at the shopping mall—but such a kernel is not sufficient to bring the activity within the protections of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L.Ed.2d 18 (1989) (finding insufficient the expressive content of dance-hall gatherings); *see also United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech'. . . ."). Although the Court is unwilling to conclude that recruiting has no expressive content, any such expressive content is ancillary to the practical and overriding purpose of recruiting—the hiring of future employees.

For this reason, recruiting differs dramatically from soliciting contributions and proselytizing. Soliciting contributions implicates a variety of free speech interests—"communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 631, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980). Because charitable solicitations are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," the flow of such information would likely cease without solicitation. *Id.* at 632, 100 S. Ct. 826. Where the component parts of a

single expressive activity are inextricably intertwined, as in the case of soliciting contributions, both the speech and non-speech parts receive full constitutional protection. *See Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L.Ed.2d 669 (1988). Soliciting contributions is simply impossible without the concomitant advocacy of a particular cause or viewpoint. The financial component of soliciting contributions is a mere means to achieving the intended result, to wit, the propagation of ideological points of view. And there can be no more robust First Amendment interest than the dissemination of ideas or the advocacy of causes. Recruiting does not implicate the same free speech interests. The dissemination or propagation of views and ideas forms, if at all, only a fraction of the recruiting process. Recruiting has an economic or functional motive; the advocacy of causes, which lies at the very heart of solicitation, is virtually absent. The Court therefore refuses to confer upon this "kernel of expression" the constitutional equivalence of soliciting contributions. *See Village of Schaumburg*, 444 U.S. at 631, 100 S. Ct. 826 (noting that "charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services").

Proselytizing is even less similar to recruiting than soliciting contributions. To proselytize is to "convert from one religion, belief, opinion, or party to another." *Webster's Third New International Dictionary* 1821 (1993). The Court fails to see how the recruiting of potential employees is as communicative or expressive as proselytizing to change one's beliefs or opinions. Recruiting and proselytizing are not equivalents in the

constitutional sense. And because recruiting has a dominant functional purpose, it lacks the requisite communicative content necessary to make this case analogous to *Hurley*.

Furthermore, as each contingent marching in a parade is necessarily understood to contribute something to a common theme, there is no customary means for private sponsors to disavow any identity of viewpoint between themselves and the selected participants. *Hurley*, 515 U.S. at 576, 115 S. Ct. 2338. Thus, the use of disclaimers "would be quite curious in a moving parade." *Id.* (comparing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980) (owner of shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speaker . . . stands")). "[A] parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 577, 115 S. Ct. 2338. In contrast, law schools can effectively disclaim any recruiting message and can easily distance themselves ideologically from the military recruiters. Unlike a parade, a recruiting function does not proclaim an overall message which could be destroyed by the presence of an individual recruiter, especially where disclaimers can expressly disavow any ideological connection to that recruiter.

In short, if there is any expressive component to recruiting, it is entirely ancillary to its dominant economic purpose. Because recruiting activities on a campus or at a job fair, although not entirely without communicative content, are far less expressive than a parade and other such highly expressive activities like

soliciting contributions and proselytizing, and because the presence of military recruiters is far less expressive than a contingent marching behind a banner, the effect on First Amendment interests in requiring law schools to open themselves up to military recruiters is far more attenuated. Plaintiffs' reliance on *Hurley* is therefore unavailing.

Apart from *Hurley*, Plaintiffs argue that the military's application of the Solomon Amendment compels them to endorse a message which they abhor. The compelled endorsement to which Plaintiffs object does not involve words, which convey a clear ideological message. Instead, the alleged compulsion is indirect and less precise: it involves the conduct of law schools in permitting or assisting a recruiting activity. A threshold issue, then, is whether this conduct is expressive. *See Troster v. Pennsylvania State Dep't of Corr.*, 65 F.3d 1086, 1091 (3d Cir. 1995), *cert. denied*, 516 U.S. 1047, 116 S. Ct. 708, 133 L.Ed.2d 663 (1996).

Conduct must be "sufficiently imbued with elements of communication" to implicate the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409-10, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974); *Troster*, 65 F.3d at 1090 (rejecting corrections officer's claim that regulation requiring wearing of an American flag patch violated First Amendment by compelling him to engage in expressive conduct); *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 161 (finding that residents failed to establish that affixing of *lechis* to utility poles to create *eruv* was expressive conduct entitled to First Amendment protection). The test, as articulated by the Third Circuit, is "whether, considering the 'nature of [the] activity, combined with the factual context and environment in which it was undertaken,'" . . . "the activity

[is] sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . ." *Tenafly Eruv Ass'n*, 309 F.3d at 159 (citations omitted); *Troster*, 65 F.3d at 1090. This is a fact-sensitive, context-dependent inquiry. *Tenafly Eruv Ass'n*, 309 F.3d at 159; *Troster*, 65 F.3d at 1090.

The relevant activity at issue for purposes of a compelled speech analysis is that of the law schools in assisting the military recruiters. The essence of Plaintiffs' claim is that law schools are being required to endorse the military's recruiting 'message.' The Court believes that the law schools' actions in assisting military recruiters are insufficiently imbued with elements of communication to require the protection of the First Amendment. The Solomon Amendment does not compel law schools to say anything. While allowing or even assisting military recruiters on campus could be viewed as a dilution of the law schools' message of non-discrimination, it is far different from endorsing the military's policy towards sexual orientation, particularly where, as here, there is no restriction on speech or conduct disclaiming any such endorsement. This case does not present the scenario of directly requiring a private speaker to participate in the dissemination of a particular message, as in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943) (forcing a conscientious objector to say the pledge of allegiance); *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977) (forcing a citizen to display state's motto); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 106 S. Ct. 903, 89 L.Ed.2d 1 (1986) (plurality) (forcing utility company to distribute potentially adverse propaganda with billing statements); *Miami*

Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974) (forcing a newspaper to provide space to political candidates it opposes). Such cases involved an outright regulation on speech and a patent attempt by the government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642, 63 S. Ct. 1178. Conditioning receipt of federal funds upon an educational institution's willingness to assist the military's recruiting efforts involves a less serious infringement upon First Amendment liberties than compelling the affirmative act of a flag salute or even the passive act of carrying the state motto on one's license plate. Facilitating interviews and even disseminating recruiting literature on behalf of military recruiters, when a law school does all these things for every other potential employer in the context of a large recruiting function, are not obvious endorsements of a particular ideological point of view. The Court therefore rejects Plaintiffs' contention that the Solomon Amendment requires law schools to endorse the military's recruiting 'message.'

To sum up, the presence of the military on campus does not significantly intrude upon the law schools' ability to express their views, thus presenting a very different situation than those considered in *Dale* or *Hurley*. The Court believes that this difference is constitutionally significant. As the presence of military recruiters on campuses or job fairs does not significantly affect the law schools' ability to espouse or advocate their own viewpoints, Plaintiffs' claim of expressive association fails the second prong of the framework established in *Dale*. Therefore, there is no

unconstitutional infringement on the law schools' free expression rights.

Having determined that the inclusion of a periodic visitor in the context of a large recruiting function does not significantly affect the law schools' ability to express their message, the Court need not reach the third step of the *Dale* analytical framework. Yet, even if Plaintiffs survived the second step of the *Dale* analysis by demonstrating that the Solomon Amendment significantly affects law schools' free speech and associational interests, Plaintiffs' claim that these rights have been violated still fails, as such rights can be overridden by competing governmental interests. *Dale*, 530 U.S. at 648, 120 S. Ct. 2446.

(c) Balancing of Interests

The final step in the *Dale* analysis involves balancing the First Amendment interests implicated by the Solomon Amendment with competing societal interests to determine whether the statute transgresses constitutional boundaries. Plaintiffs argue that because the Solomon Amendment burdens academic freedom, along with speech and associational rights, it cannot withstand constitutional scrutiny unless it passes a heightened scrutiny test, *i.e.*, that it was "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms." *Dale*, 530 U.S. at 648, 120 S. Ct. 2446. Plaintiffs maintain that the Solomon Amendment fails both prongs of this test. However, without deciding whether the Solomon Amendment would survive this heightened level of scrutiny, the Court believes that this test does not apply here.

It is true that in *Dale* the Supreme Court adopted a heightened scrutiny test because the state action directly affected the groups' associational activities. But as the Third Circuit noted in *Pi Lambda Phi Fraternity, Inc.*, there are three different levels of scrutiny to state actions affecting expression, "depending on the character of the relationship between the state action and the protected expression." 229 F.3d at 445. The most rigorous standard of review is triggered when the state action directly burdens expressive rights. *Dale* involved this kind of direct effect, as the state statute in question required the Boy Scouts to accept an unwanted member in a leadership position. *Id.* at 445-46. A less stringent, intermediate scrutiny test is appropriate in circumstances where the state action has only an incidental effect on the right to free expression. *Id.* at 446 (citing *O'Brien*, 391 U.S. 367, 88 S. Ct. 1673). And since almost every governmental action can be characterized as having some indirect effect on First Amendment interests, "indirect and attenuated effects on expression do not rise to the level of a constitutional violation." *Id.* at 439. Thus, in circumstances where there is neither direct regulation of protected expression nor an incidental effect on such expression, the state action in question does not merit even the intermediate scrutiny test. *Id.* at 447 (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704-05, 106 S. Ct. 3172, 92 L.Ed.2d 568 (1986)).

As an initial matter, the Solomon Amendment differs from the anti-discrimination statute at issue in *Dale* in two important respects. First, the Solomon Amendment does not require law schools to accept unwanted persons as leaders of their expressive organizations. Second, the Solomon Amendment is not a regulatory

restriction; it is an exercise of the congressional spending power. Thus, the Solomon Amendment affects associational rights in an indirect and less immediate fashion. *Compare Dale*, 530 U.S. at 659, 120 S. Ct. 2446 (holding that public accommodations law directly and immediately affected associational rights). As such, the most rigorous standard of review employed by the Supreme Court in *Dale* is not applicable here.

The Solomon Amendment literally conditions campus-based funding on the allowance of the military on campus for recruiting purposes. Because there is little that is inherently expressive about the act of permitting military recruiters access to campus (or providing assistance to recruiters), the statute targets conduct, not speech. *See, e.g., Hurley*, 515 U.S. at 572, 115 S. Ct. 2338 (noting that public accommodations statute did not, on its face, target speech since it focuses on the act of discriminating); *Jews for Jesus, Inc. v. Jewish Community Relations Council of N.Y., Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (holding that discrimination statutes are aimed at conduct, *i.e.*, discrimination, not speech); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487, 113 S. Ct. 2194, 124 L.Ed.2d 436 (1993) (noting that Title VII is a permissible content-neutral regulation of conduct). But as an expressive element can be subsumed within otherwise non-communicative conduct, the mere fact that the Solomon Amendment might target conduct, and not speech, does not insulate it from constitutional scrutiny. Here, the law schools have adopted policies against discrimination on the basis of sexual orientation. As corollaries to these non-discrimination policies, law schools also maintain policies against offering their resources, support, or endorsement to any employer that discriminates. By

conditioning federal funding on campus access for military recruiters, the Solomon Amendment has an undeniable but incidental effect on these policies. A communicative or expressive element therefore exists in the conduct targeted by the Solomon Amendment. As such, the applicable standard of review is found in *United States v. O'Brien*, 391 U.S. 367, 388, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968) (applying medium scrutiny test to state action having an incidental effect on right to free expression).[9]

It is well established that the government may constitutionally regulate conduct even if such regulation entails an incidental limitation on speech. *O'Brien*, 391 U.S. at 375, 88 S. Ct. 1673. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376, 88 S. Ct. 1673. A government regulation is sufficiently justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377, 88 S. Ct. 1673. Given that the Solomon Amendment targets conduct but nevertheless entails an incidental limitation on First Amendment freedoms, it must survive this

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[9] The Court notes that if the Solomon Amendment's effect on law school recruiting policies were independently evaluated under a traditional free speech analysis, and not within the *Dale* analytical framework, the *O'Brien* test would still apply, as the effect on these policies is incidental.

intermediate level of scrutiny to pass constitutional muster under the third step of the *Dale* analysis.

The Constitution empowers Congress to raise and support a military. *See* U.S. Const. art. I, § 8 (providing that "Congress shall have the Power . . . To raise and support Armies"). "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *Id.* (citing *Lichter v. United States*, 334 U.S. 742, 755-58, 68 S. Ct. 1294, 92 L.Ed. 1694 (1948); *Selective Draft Law Cases*, 245 U.S. 366, 38 S. Ct. 159, 62 L.Ed. 349 (1918)). If Congress possesses the power to conscript manpower for military service and the concomitant power to enact legislation in furtherance thereof, it also possesses the lesser power to recruit manpower for military service and enact the necessary enabling legislation. *See id.* (citing *Lichter*, 334 U.S. at 756, 68 S. Ct. 1294; *Selective Draft Law Cases*, 245 U.S. 366, 38 S. Ct. 159, 62 L.Ed. 349 (noting that power of Congress to classify and conscript manpower is beyond dispute)). Hence, the Solomon Amendment is within the constitutional power of Congress.

It is also evident that the Solomon Amendment furthers an important governmental interest. Pursuant to its constitutional grant of authority, Congress has imposed on the military an affirmative obligation to "conduct intensive recruiting campaigns to obtain enlistments" in the Armed Forces. 10 U.S.C. § 503(a). And as the Third Circuit has recognized, "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *United States v. City of Philadelphia*, 798 F.2d at 86. Indeed, in *O'Brien*, the Supreme Court stated that it is "apparent that the

Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances." 391 U.S. at 381, 88 S. Ct. 1673. Access to law schools and their students is an integral part of the military's effort to conduct "intensive recruiting campaigns to obtain enlistments." 10 U.S.C. § 503(a). Clearly, then, the Solomon Amendment furthers a substantial and important interest in gaining access to law schools for purposes of military recruiting and thereby assuring the effectiveness of raising a volunteer military. And whereas in *Dale* the state interests embodied in a public accommodations law did not justify "such a severe intrusion" on the Boy Scouts' right to expressive association, here the relatively modest intrusion is outweighed by the compelling governmental interest in on-campus military recruiting. 530 U.S. at 660, 120 S. Ct. 2446.

Even so, to avoid constitutional difficulty, the Solomon Amendment's incidental restriction on First Amendment freedoms must be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S. Ct. 1673. Plaintiffs, relying on a heightened standard of review, argue that any interest the Government has in recruiting students could be achieved by less burdensome means as there are other ways in which the military can recruit students without the assistance of law school personnel. Even assuming, without deciding, that the governmental interest presented in the Solomon Amendment could be achieved through less burdensome means, the *O'Brien* test does not demand such precision. Later Supreme Court cases have stated that to satisfy the *O'Brien* standard, "a regulation need not be the least speech-restrictive

means of advancing the Government's interests." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994). "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *U.S. v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985). "Narrow tailoring in this context requires, in other words, that the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broad. Sys., Inc.*, 512 U.S. at 662, 114 S. Ct. 2445 (citations omitted). Such regulations are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689, 105 S. Ct. 2897.

The Solomon Amendment passes constitutional review under this standard. Law schools universally provide assistance to employers who do not discriminate (Rosenkranz Decl. ¶ 7). As a preliminary matter, then, military recruiters are placed at a disadvantage as compared to other competing employers without the assistance of the law schools. Although it may be true, as Plaintiffs argue, that military recruiters can still contact students and interview students either off-campus or at some on-campus location, this ignores the fact that a law school recruiting function is the chief mechanism of connecting current law students with future employers. Without access to such mechanisms, the substantial governmental interest in gaining access to campuses for the purpose of military recruiting will be achieved less effectively.

Moreover, as previously stated, the Solomon Amendment is not a regulatory restriction; educational institutions remain free to reject military recruiters. But if educational institutions desire the assistance of federal funding, they must allow the military to fulfill its congressional directive "to conduct intensive recruiting campaigns to obtain enlistments." 10 U.S.C. § 503(a). Most importantly, these institutions remain free to voice objections to the military and its internal policies and to take ameliorative actions to distance themselves from the military's discriminatory policy. And for the reasons already set forth, the Court believes that the actual effect of the Solomon Amendment on the speech and associational rights of law schools is relatively minor. The Solomon Amendment therefore does not suppress "substantially more speech than . . . necessary" to ensure the effectiveness of on-campus military recruiting. *Turner Broad. Sys., Inc.*, 512 U.S. at 668, 114 S. Ct. 2445 (citations omitted).[10]

Finally, the Solomon Amendment is also unrelated to the suppression of ideas. A law school or institution of higher learning that prohibits or in effect prevents military recruiters from gaining entry to campus or access to students will be disentitled to those funds regardless of the viewpoint that prompted the decision

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[10] Plaintiffs' facial challenge to the Solomon Amendment alleges that the restriction of law schools' associational freedoms results from the mere presence of military recruiters on campuses. But if Plaintiffs define the restriction as the presence of military recruiters on campuses, it is obvious that any means less restrictive of law schools' associational rights would entirely frustrate the governmental objective, which is to gain access to campuses for the purpose of military recruiting. That is, it is wrong to claim that the Government could achieve its objective in a less burdensome manner by abandoning that very objective.

to deny assistance to such recruiters or prohibit them from campuses. *See* discussion *infra*. Additionally, as already stated, law schools are free to take ameliorative actions to disclaim any endorsement of the military's recruiting policy; in fact, law schools can outright denounce the military without running afoul of the Solomon Amendment's prohibitions. For the non-communicative impact of their conduct, and for nothing else, will law schools transgress the Solomon Amendment. *See O'Brien*, 391 U.S. at 383, 88 S. Ct. 1673.

Plaintiffs nonetheless allege that the purpose behind the Solomon Amendment was entirely related to the suppression of ideas. In support of this contention, Plaintiffs point to certain statements in the legislative history. But as the Supreme Court stated in *O'Brien*, "inquiries into congressional motives or purposes are a hazardous matter." 391 U.S. at 383, 88 S. Ct. 1673. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.*; *see also Turner Broad. Sys., Inc.*, 512 U.S. at 652, 114 S. Ct. 2445. This Court, likewise, refuses to strike down a congressional statute "which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, 391 U.S. at 384, 88 S. Ct. 1673. Here, the overriding congressional purpose is unrelated to the suppression of speech.

Accordingly, the Solomon Amendment passes constitutional muster under the *O'Brien* framework for governmental actions having an incidental effect on speech.

E. Conclusion

For the foregoing reasons, the Solomon Amendment does not unconstitutionally infringe Plaintiffs' free speech and associational rights. Even when considered against the background of academic freedom, the alleged intrusion on Plaintiffs' speech and associational rights falls short of a constitutional violation. Accordingly, there is no unconstitutional condition.

II. Viewpoint Discrimination Claim

Plaintiffs argue that the text of the Solomon Amendment, as well as the military's implementation of that text, discriminates on the basis of viewpoint by promoting only a pro-military recruiting message and by punishing only those schools that exclude the military because of a belief that the military's recruiting policy is immoral. This contention is unavailing. The Solomon Amendment does not "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Turner Broad. Sys., Inc.*, 512 U.S. at 640, 114 S. Ct. 2445 (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991)). Even if the Solomon Amendment affects speech, the impact on speech is incidental, and there is virtually no risk of excising specific ideas or viewpoints from the public discourse. A law school that prevents military recruiters from gaining access to campus or students will forfeit federal funding regardless of the viewpoint that prompted the decision to deny access to such recruiters. More importantly, an institution that decides to accept federal funding and not prevent military recruiters from gaining access to campus or

students remains free to voice objections and take ameliorative actions to disassociate itself from the military recruiters. This decision may impact expression by affecting a recruiting policy, but an indirect effect on speech, without more, cannot sustain a claim for invidious viewpoint discrimination. *See Turner Broad. Sys., Inc.*, 512 U.S. at 643, 114 S. Ct. 2445. The Court thus rejects the premise that the Solomon Amendment draws a distinction based on the viewpoint expressed.

It is, of course, axiomatic that the government may not regulate speech based on its substantive content or the viewpoint it conveys. *Rosenberger*, 515 U.S. at 828, 115 S. Ct. 2510; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed."). Plaintiffs contend that the Solomon Amendment discriminates on the basis of viewpoint because it does not apply to every academic institution, but only to those institutions that target the military in protest. The first flaw in this argument is that anti-military sentiment can and does thrive in situations where law schools decide to comply with the Solomon Amendment. The record demonstrates that law school administrators, faculty, and students have all openly expressed their disapproval of the military's discriminatory policy through various channels of communication. Some law schools have posted ameliorative statements throughout the school; law faculty and student bar resolutions have openly condemned the military's policy; and faculty and students have held demonstrations protesting the military's presence on campus. This is simply not a case where the Government is trying to "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc.*, 512 U.S. at 642, 114 S. Ct. 2445.

The second flaw is that the Solomon Amendment is not a direct restriction on expression; the impact on law school recruiting policies is indirect. *Compare Rosenberger*, 515 U.S. 819, 115 S. Ct. 2510; *Carey v. Brown*, 447 U.S. 455, 100 S. Ct. 2286, 65 L.Ed.2d 263 (1980) (invalidating as impermissible content discrimination a law that prohibited all picketing in a residential neighborhood, except labor picketing); *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 99 L.Ed.2d 333 (1988) (prohibiting display of signs bringing foreign government into disrepute within 500 feet of the embassy was content-based restriction on political speech). By its terms, the Solomon Amendment does not attempt to silence a particular viewpoint thought to be inimical to the Government's interests. The statute is not concerned with the underlying motivation that may prompt an institution to deny access to military recruiters. Today, the motivation arises from a disagreement with the military's policy towards sexual orientation; tomorrow, the motivation might stem from some other disagreement with the military. The point is that the Solomon Amendment continues to target the same conduct, to wit, denial of access to campus and students for military recruiting, even if the underlying viewpoint that might prompt an institution to deny such access is subject to change.[11]

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[11] The Court does not share Plaintiffs' view that the DOD's current posture is predominantly an effort to suppress the law schools' messages of non-discrimination. Plaintiffs' arguments to the contrary are not convincing since they are unsupported by

Nor does the fact that the Solomon Amendment expressly excludes certain educational institutions support Plaintiffs' contention that the statute is viewpoint-based. That the statute does not apply to an institution that "has a longstanding policy of pacifism based on historical religious affiliation," 10 U.S.C. § 983(c)(2), merely comports with the long-standing principle, codified by statute, that a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form" is not required to engage in military service. 50 U.S.C. App. § 456(j). It would serve no common-sense purpose to invoke the Solomon Amendment against pacifist schools where military recruiting efforts would be futile. Likewise, the statute does not apply to educational institutions where there is a lack of student interest, 32 C.F.R. § 216.4(c)(6)(ii), since military recruiting would also be futile in the absence of any such interest. And that it does not apply to institutions where "all employers are similarly excluded from recruiting on the premises of the covered school," 32 C.F.R. § 216.4(c)(3), merely reflects the DOD's reasonable view that it should not give the military employer an unfair advantage by invoking the Solomon Amendment against an institution which prohibits all employers from recruiting on campus. Thus, the exceptions carved out by the Solomon Amendment are based on pragmatic considerations, unrelated to speech, and in no way support Plaintiffs' argument that the statute discriminates on the basis of viewpoint.

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factual evidence which goes directly to any improper motivation. The evidence supplied suggests that the DOD is attempting to enforce the law as they currently construe it.

Finally, Plaintiffs argue that the Solomon Amendment is viewpoint-based because it promotes one viewpoint: the Government's pro-military viewpoint. For the reasons discussed *supra*, the Court rejects the notion that recruiting is sufficiently communicative to make this case similar to *Barnette*, *Wooley*, and the other compelled speech cases relied on by Plaintiffs. Any expressive component to recruiting is incidental, and any threat of government compulsion to adopt a particular viewpoint is far too tenuous and insubstantial to trigger constitutional alarm. Furthermore, to the extent recruiting is expressive, "it [is] inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Southworth*, 529 U.S. at 229, 120 S. Ct. 1346 (citing *Rust*, 500 U.S. 173, 111 S. Ct. 1759; *Regan*, 461 U.S. at 548-49, 103 S. Ct. 1997). Presumably, a government 'viewpoint' is subsumed within all federal spending programs, for the spending power permits the government to promote broad policy objectives through the conditioned-receipt of federal funds. Public funds spent on recruiting for the military are no different. But a federal subsidy program does not discriminate based on viewpoint simply because it has incidental effects on First Amendment interests. *See Finley*, 524 U.S. at 587-88, 118 S. Ct. 2168 (noting that government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake); *Regan*, 461 U.S. at 550, 103 S. Ct. 1997 ("Where governmental provision of subsidies is not aimed at the suppression of dangerous ideas, its power to encourage actions deemed in the public interest is necessarily far broader.") (internal citations omitted).

The Solomon Amendment is not a direct regulation of speech, notwithstanding the incidental effect on First Amendment freedoms. And because it does not target speech, it draws no distinction based on the viewpoint expressed. Accordingly, Plaintiffs' have not demonstrated a likelihood of success on the merits of their viewpoint discrimination claim.

III. Void-for-Vagueness Claim

Plaintiffs argue that the Solomon Amendment and its implementing regulations are unconstitutionally vague for failing to offer clear guidance on what actions or inactions will result in a determination that law schools have "either prohibit[ed], or in effect prevent[ed]" the military from gaining "entry to campuses, or access to students," 10 U.S.C. § 983(b)(1), or have satisfied the exemption for affording the military a "degree of access . . . [that] is at least equal in quality and scope to that afforded to other employers," 32 C.F.R. § 216.4. It follows, according to Plaintiffs, that military recruiters have unbridled discretion to decide what acts or omissions do not comply with the statute and which institutions are to be targeted for non-compliance. Plaintiffs further argue that it is unclear whether and to what extent an offending subelement risks funding to the entire university.

The Government responds that the conditional funding requirements imposed by the Solomon Amendment need only be set forth with a reasonable degree of certainty and, judged by that standard, the statute survives constitutional scrutiny. The Government maintains that the statute's conditional funding limitations are clear, the implementing regulations sufficiently define the scope of the statute, and that uniformity of application is ensured by a centralized decisionmaker—the United States Secretary of Defense.

There are two general standards for evaluating whether a law is unconstitutionally vague. First, a law must not "forbid[ ] or require[ ] the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L.Ed. 322 (1926). Second, the law "must provide explicit standards for those who apply" it so as to avoid arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). But those criteria are not to be "mechanically applied." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Id.*

Whether a law "threatens to inhibit the exercise of constitutionally protected rights" is critical in determining the level of clarity demanded by the Constitution. *Id.* at 499, 102 S. Ct. 1186. "Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards." *Finley*, 524 U.S. at 588, 118 S. Ct. 2168. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 432-33, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted). The underlying rationale is that an unclear law regulating speech might deter persons from

engaging in protected speech or activity, and the very threat of sanctions could have as strong a deterrent effect on the exercise of fundamental rights as the actual application of sanctions. *Id.* at 433, 83 S. Ct. 328. Thus, vagueness inquiries as to laws regulating fundamental constitutional rights such as the freedoms of speech, assembly, or association, are particularly rigorous.

The corollary to that rule is that some laws are subject to a slightly less rigorous vagueness standard. Terms that are unconstitutionally vague for purposes of criminal or regulatory statutes might pass constitutional muster in other contexts. *See, e.g., Finley*, 524 U.S. at 588-89, 118 S. Ct. 2168 (holding "undeniably opaque" terms capable of raising significant vagueness concerns in certain contexts not unconstitutionally vague in selective subsidies context). Economic regulation, for example, is subject to a "less strict vagueness test" because it often deals with narrowly defined circumstances and because "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates*, 455 U.S. at 498, 102 S. Ct. 1186.

The Solomon Amendment is not a penal statute, nor is it a direct regulation on speech. The statute conditions the receipt of federal funds on conduct—a school permitting a periodic visitor (military recruiter) who has no enduring association with the school to engage in on-campus recruiting. So viewed, the Solomon Amendment does not readily trigger a heightened vagueness standard. *Cf. Finley*, 524 U.S. at 599, 118 S. Ct. 2168 (Scalia, J., concurring) ("[W]hat is true of the First Amendment is also true of the constitutional

rule against vague legislation: it has no application to funding. Insofar as it bears upon First Amendment concerns, the vagueness doctrine addresses the problems that arise from government regulation of expressive conduct, not government grant programs.") (internal citations omitted). On the other hand, the Solomon Amendment is not altogether devoid of First Amendment implications. The Court acknowledges that, as a practical matter, law schools needed to adjust their existing recruitment policies in order to comply with the Solomon Amendment. But, as explained *supra*, the statute has only an incidental effect on the law schools' First Amendment rights. The Court accordingly concludes that a slightly less rigorous vagueness standard is appropriate.

The Solomon Amendment conditions funding on a school not having "a policy or practice . . . that either prohibits, or in effect prevents," military recruiters from "gaining entry to campuses" or gaining "access" to students for recruiting purposes. 10 U.S.C. § 983. Plaintiffs point to three possible interpretations of that language: (1) the schools need do no more than refrain from closing its doors to the military in order to secure funding; (2) the schools must provide some level of assistance to the military in its recruiting efforts; or (3) the schools must treat the military the same as any other employer. Plaintiffs rightly point out that the DOD regulations do not define the operative terms. See 32 C.F.R. § 216.3. But the mere absence of definitions does not necessarily render the statute vague, particularly where, as here, the terms are subject to interpretation according to their commonly understood meaning. *See Horn v. Burns & Roe*, 536 F.2d 251, 255 (8th Cir. 1976) (noting that requirement of

reasonable certainty "does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding"); *see also Village of Hoffman Estates*, 455 U.S. at 501, n. 18, 102 S. Ct. 1186 (relying in part on dictionary definition for purposes of vagueness analysis); *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 123 (5th Cir. 1991) (same); *House v. United States, I.R.S.*, 593 F. Supp. 139, 142 (W.D. Mich. 1984) (same).

The operative terms of the Solomon Amendment are not complex or difficult to understand such that one of ordinary intelligence must "necessarily guess" at their meaning. *See Connally*, 269 U.S. at 391, 46 S. Ct. 126. The military "gaining entry" to campuses plainly contemplates entering the campus gates. To enter something is "to go or come into" it. *Webster's Third New International Dictionary* 756 (2003). Access is defined as "permission, liberty, or ability to enter, approach, communicate with." *Id.* at 11. Thus, to comply with the Solomon Amendment, a school must allow the military to come onto campus and to communicate with interested students for purposes of recruiting. Schools that do not allow the military on campus, and thereby prohibit on-campus recruitment, do not comply with the statutory requirements. The statute is abundantly clear in that respect.

Schools that allow the military on campus, yet "in effect prevent" military recruiting efforts also do not comply with the Solomon Amendment. The phrase in effect means "virtually" or "in substance," *id.* at 724, and the term prevents means "to keep from happening," *id.* at 1798. "In effect prevents" therefore contemplates virtually keeping the military from recruiting students or posing obstacles that would normally lead

to abandonment of the recruiting effort. Importantly, Congress chose not to use language connoting anything less than a total or effective prohibition on the military's recruitment efforts, such as "interfere," "hinder," "impede," or "adversely affect." It follows that anything short of preventing or totally thwarting the military's recruitment efforts does not trigger funding denial pursuant to the statute. Although it is conceivable that assistance provided to other employers (which thereby facilitates those employers' recruiting efforts) could, under certain circumstances, rise to the level of "in effect prevent[ing]" military recruitment efforts, the fact "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous" to pass constitutional muster. *U.S. v. Petrillo*, 332 U.S. 1, 7, 67 S. Ct. 1538, 91 L.Ed. 1877 (1947).

Nor is the exemption for schools that provide a "degree of access by military recruiters [that] is at least equal in quality and scope to that afforded to other employers," 32 C.F.R. § 216.4, void for vagueness. Plaintiffs challenge that exemption as "supremely subjective." The Court disagrees. The exemption is necessarily applicable to a variety of circumstances because the degree of access provided to employers will vary across schools. The benchmark for satisfying the exemption is what degree of access a given school provides to other employers and the regulation then requires a comparison with the degree of access given to the military recruiters. Such a comparison is not imbued with either vagueness or undue subjectivity. The Court is unwilling to conclude that the exemption's flexibility and broad applicability renders it imper-

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missibly vague. *See Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 339-41, 72 S. Ct. 329, 96 L.Ed. 367 (1951) ("[M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.").

Lastly, the Court concludes that the consequences of non-compliance with the Solomon Amendment are sufficiently clear to pass constitutional muster. The statute denies federal funding to "an institution of higher education (including any subelement of such institution) if . . . that institution (or any subelement of that institution) has a policy or practice" prohibiting military recruitment efforts. 10 U.S.C. § 983(b). Plaintiffs point out that, over time, the military has adopted three different interpretations of that language: (1) funding restrictions are limited to the offending subelement, *see* 61 Fed. Reg. 7739; 32 C.F.R. § 216.3(b)(1) (prior to January 3, 2003) ("In the event of a determination . . . affecting only a subelement of a parent institution . . . , the limitation on the use of funds . . . shall apply only to the subelement and not to the parent institution as a whole."); (2) the extent of funding restrictions varies depending on the source of funds, 48 C.F.R. § 209.470.1; (3) or, as allegedly threatened by some military functionaries, all federal funds from all sources are cut off due to a subelement's non-compliance with the statute, (Chemerinsky Decl. ¶ 21; Gerken Decl. ¶ 15). Plaintiffs acknowledge, though, that current DOD regulations provide that an offending subelement risks DOD funds flowing to both

the subelement and its parent university, as well as other federal funds flowing to the subelement. (Pls.' Mem. Supp. Prelim. Inj. at 10 (citing 65 Fed. Reg. 2056 (Jan. 13, 2000) and 32 C.F.R. § 216.3)). Current regulations thus define the consequences of violating the Solomon Amendment: An offending subelement, or law school, risks DOD funding earmarked for the law school and its parent institution, as well as other federal funding flowing to the law school itself (but not to the parent). In other words, the subelement limitation does not apply to DOD funds.

Plaintiffs do not allege that the DOD has made a final determination denying funding in a manner unauthorized by the statute, and there is nothing in the record to suggest that such action has been taken. The crux of Plaintiffs' claim as to the consequence of non-compliance is that military functionaries have threatened schools with a university-wide cut-off of funding that is unsupported by existing DOD regulations. In that regard, Plaintiffs contend that the military recruiters are akin to local governmental officials who exercise unbridled discretion on licensing decisions concerning demonstrations, parades, solicitation, and like activities. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L.Ed.2d 771 (1988) (ordinance giving discretion to mayor in issuing permits for newsbox placement on city sidewalks); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935, 22 L.Ed.2d 162 (1969) (ordinance requiring permit for parade); *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L.Ed. 949 (1938) (city ordinance prohibiting distribution of leaflets or advertising without city manager's permission).

The nature of Plaintiffs' claim—that a threatened cut-off of university funding runs afoul of the implementing regulations—belies the assertion that there is no clear guidance as to funding consequences. The guidance that exists is sufficiently clear, though unwelcome. That guidance ensures against arbitrary enforcement of the statute. Furthermore, military recruiters have no express or implied authority to make final funding determinations. Only the Secretary of Defense has statutorily conferred authority to make those decisions. The concern as to arbitrary enforcement is minimal given a centralized decisionmaker and, as previously discussed, the Court believes that the terms of the Solomon Amendment are sufficiently clear so as not to confer unfettered discretion in targeting institutions or making final funding determinations. Plaintiffs of course remain free to challenge a final funding determination as inconsistent with the Solomon Amendment or its implementing regulations.

The Court concludes that Plaintiffs have not established a likelihood of success on the merits on their vagueness challenge to the Solomon Amendment and its implementing regulations. That is not to say that the Court agrees with the DOD's proposed interpretation that the statute requires law schools to "provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers." (Eskridge Decl. ¶ 55, Ex. 18). The Court's conclusion is in no way an endorsement of the DOD's position. The DOD's interpretation, in effect, turns the exemption in 32 C.F.R. § 216.4 into a statutory requirement, and the Court has grave reservations as to whether such an interpretation is sustainable as a matter of statutory construction.

It is axiomatic that the DOD is not at liberty to adopt an interpretation contrary to the plain wording of the Solomon Amendment. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, n. 9, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). By letter dated May 29, 2003, Acting Deputy Under-Secretary of Defense William Carr stated that the DOD interpreted 10 U.S.C. § 983(b)(1) to require that there not "be a substantial disparity in the treatment of military recruiters as compared to other potential employers" and that the statute "should, and will, be construed to require equal access for military recruiters—the construction that better permits the military to fulfill congressional intent." That interpretation of the Solomon Amendment is problematic for several reasons. Insisting on "equal access" and demanding that there be no "substantial disparity" are not the same thing. No substantial disparity allows for something less than equal access. More importantly, the statute could easily have provided that military recruiters are to be treated the same as other employers. The statute does not so provide. While it is conceivable (in presently unknown circumstances) that a substantial disparity between treatment of the military and other employers could rise to the level of "in effect prevent[ing]" military recruitment efforts, the Court simply fails to see how the statute requires absolute parity when all that it requires is that a school not "prohibit" or "in effect prevent" military recruiting efforts. Finally, reading the "equal in quality and

scope" aspect into the substantive statutory requirements swallows the exemption for schools allowing a "degree of access by military recruiters [that] is at least equal in quality and scope to that afforded to other employers," 32 C.F.R. § 216.4. That exemption applies to schools that do not comply with the requirements of the statute.

The Court concludes that Plaintiffs have not established a likelihood of success on their void-for-vagueness claim, notwithstanding the DOD's seemingly unwarranted interpretation that the Solomon Amendment requires law schools to treat the military the same as other employers.

IV. Remaining Factors for Preliminary Injunction

Having concluded that Plaintiffs have not established a likelihood of success on the merits of their constitutional challenges to the Solomon Amendment and its implementing regulations, the Court need not decide whether Plaintiffs have satisfied the remaining requirements for preliminary injunctive relief. That is because "'a failure to show a likelihood of success . . . must necessarily result in the denial of a preliminary injunction.'" *Morton v. Beyer*, 822 F.2d 364, 371 (3d Cir. 1987) (quoting *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982)). For the sake of completeness, though, the Court will address the three remaining factors for preliminary injunctive relief—irreparable harm, balance of hardships, and public interest. *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 157. As will be seen, evaluation of those factors is interrelated with the Court's evaluation of the likelihood-of-success factor.

The loss of First Amendment freedoms constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). "[T]he irreparable injury issue and likelihood of success issue overlap almost entirely" where First Amendment violations are concerned. *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999). Given this Court's conclusion that Plaintiffs have not established a likelihood of success on the merits of their First Amendment claims, there is no risk of irreparable harm absent a preliminary injunction.

The balance-of-hardships and the public interest factors also weigh in favor of the Government. That an Act of Congress is presumptively constitutional is "an equity to be considered in favor of applicants in balancing hardships." *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324, 105 S. Ct. 11, 82 L.Ed.2d 908 (1984) (Rehnquist, Circuit Justice) (granting request for stay of injunction enjoining enforcement of statute on constitutional grounds). The Solomon Amendment is presumptively constitutional. Given this Court's conclusion that Plaintiffs have not established a likelihood of success on the merits of their constitutional claims, the harm to the Government in being precluded from enforcing the Solomon Amendment and engaging in on-campus recruiting outweighs the harm that would result to Plaintiffs by denying them preliminary injunctive relief. Moreover, Congress has imposed on the military an obligation to "conduct intensive recruiting campaigns to obtain enlistments" in the branches of the armed forces. 10 U.S.C. § 503(a). And "Congress considers access to [institutions of higher education] by military recruiters to be a matter of paramount importance" and an "integral part" of military recruiting efforts. *United States v. City of*

Philadelphia, 798 F.2d at 86. The Solomon Amendment furthers those interests. Enforcing the First Amendment is indisputably a matter of great public interest, but where, as here, the Court has not found a likelihood of success on the First Amendment claims, the public interest factor weighs in favor of the Government.

V. Conclusion

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction enjoining enforcement of the Solomon Amendment as unconstitutional will be denied.

APPENDIX C

10 U.S.C. 983, as amended by Pub. L. No. 108-375, Div. A, Tit. V, § 552(a) to (d), 118 Stat. 1911.

Institutions of higher education that prevent ROTC access or military recruiting on campus: denial of grants and contracts from Department of Defense, Department of Education, and certain other departments and agencies

(a) DENIAL OF FUNDS FOR PREVENTING ROTC ACCESS TO CAMPUS.—No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

(1) the Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (in accordance with section 654 of this title and other applicable Federal laws) at that institution (or any subelement of that institution); or

(2) a student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education.

(b) DENIAL OF FUNDS FOR PREVENTING MILITARY RECRUITING ON CAMPUS.—No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of

Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) EXCEPTIONS.—The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that—

(1) the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

(2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

(d) COVERED FUNDS.—(1) Except as provided in paragraph (2), the limitations established in subsections (a) and (b) apply to the following:

(A) Any funds made available for the Department of Defense.

(B) Any funds made available for any department or agency for which regular appropriations are made in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

(C) Any funds made available for the Department of Homeland Security.

(D) Any funds made available for the National Nuclear Security Administration of the Department of Energy.

(E) Any funds made available for the Department of Transportation.

(F) Any funds made available for the Central Intelligence Agency.

(2) Any Federal funding specified in paragraph (1) that is provided to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance, may be used for the purpose for which the funding is provided.

(e) NOTICE OF DETERMINATIONS.—Whenever the Secretary of Defense makes a determination under subsection (a), (b), or (c), the Secretary—

(1) shall transmit a notice of the determination to the Secretary of Education, to the head of each other department and agency the funds of which are subject to the determination, and to Congress; and

(2) shall publish in the Federal Register a notice of the determination and the effect of the determination on the eligibility of the institution of higher education (and any subelement of that institution) for contracts and grants.

(f) SEMIANNUAL NOTICE IN FEDERAL REGISTER.—The Secretary of Defense shall publish in the Federal Register once every six months a list of each institution of higher education that is currently ineligible for contracts and grants by reason of a determination of the Secretary under subsection (a) or (b).

No. 04-1152

IN THE

Supreme Court of the United States

DONALD RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WARRINGTON S. PARKER, III
PETER E. GRATZINGER

HELLER EHRMAN LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

E. JOSHUA ROSENKRANZ*
SHARON E. FRASE
JEAN-DAVID BARNEA

HELLER EHRMAN LLP
120 West 45th Street
New York, New York 10036
(212) 832-8300

* *Counsel of Record*

March 30, 2005

QUESTION PRESENTED

The Solomon Amendment commands academic institutions to distribute and post military recruiting literature, to include military recruiters in school-sponsored forums for discussion with students, to coordinate student interviews, and otherwise to disseminate and promote military recruiting messages, on pain of an across-the-board withdrawal of federal funding. This command conflicts with law schools' longstanding and evenhanded policies of refusing to abet employers that discriminate. Was the court of appeals correct in concluding that this statute should be preliminarily enjoined, as it unconstitutionally conditions funds on schools' relinquishment of their First Amendment rights?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners are U.S. Secretary of Defense Donald H. Rumsfeld; U.S. Secretary of Education Margaret Spellings; U.S. Secretary of Labor Elaine Chao; U.S. Secretary of Health and Human Services Michael O. Leavitt; U.S. Secretary of Transportation Norman Y. Mineta; and U.S. Secretary of Homeland Security Michael Chertoff, all in their official capacities.

Respondents are the Forum for Academic and Institutional Rights, Inc. ("FAIR"); the Society of American Law Teachers, Inc. ("SALT"); the Coalition for Equality; the Rutgers Gay and Lesbian Caucus; Pam Nickisher; Leslie Fischer; Michael Blauschild; Erwin Chemerinsky; and Sylvia Law.

Respondent FAIR, a New Jersey membership corporation, has no parent company, and no publicly held company owns stock in it.

Respondent SALT, a New York not-for-profit corporation, has no parent company, and no publicly held company owns stock in it.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

Law Schools Adopt Anti-Discrimination Policies to Inculcate Values

Law schools are not just about teaching students how "to draft briefs, argue motions, depose witnesses, and close deals." J.A. 376-77.[1] They are, and have long been, institutions with a mission to inculcate a set of values in their students. App. 16a. One of the most important values law schools teach is equality—that people should be judged by their qualifications and achievements, rather than their ethnicity, their race, their gender, their sexual orientation, or any other criteria bearing no relation to merit. J.A. 308-10.

For decades, law schools have practiced the values they preached by promulgating, and abiding by, anti-discrimination policies. App. 2a-3a. In these policies, these schools declare that they will not condone any act of discrimination on their campuses and will not abet any entity that discriminates. App. 3a. Such policies direct law school personnel not to support or assist any employer that refuses to certify it has a policy against invidious discrimination. App. 2a-3a. A typical policy provides:

> [The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation. . . . Before using any of the Career Services interviewing

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[1] In this brief, the government's petition for writ of certiorari is cited as "Pet.," the appendix to the petition is cited as "App.," the government's brief in the court of appeals is cited as "Gov't Br.," and the joint appendix in the court of appeals is cited as "J.A."

> facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy.

App. 3a. Law schools have always applied these anti-discrimination policies evenhandedly, refusing to assist any employer that discriminates. *E.g.*, J.A. 149, 226-27.

The Government Demands an Exception

This case arose when the government demanded an exception to these policies. Because the military discriminates on the basis of sexual orientation, *see* 10 U.S.C. § 654, military recruiters for the military's Judge Advocate General ("JAG") corps cannot certify their compliance with the schools' anti-discrimination policies. Accordingly, law schools refused to assist military recruiters in their recruiting efforts and a handful denied military recruiters access to campus altogether. App. 8a-9a.

Congress responded, in 1994, with an appropriations rider, the Solomon Amendment, which denied Department of Defense ("DOD") funds to schools that denied or prevented the military "entry to campuses or access to students." National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994). The Solomon Amendment's sponsors minced no words about the statute's purpose. They derided any policy of entirely excluding the military as "a backhanded slap at the honor and dignity of service in our Nation's Armed Forces." 140 Cong. Rec. 11,441 (1994) (Rep. Pombo). While recognizing that schools have "first-amendment rights" to refuse to assist military recruiters in protest of their discriminatory hiring policies, the Solomon Amendment's main sponsor, Rep. Gerald Solomon, urged that any schools that exercised these rights should "not expect Federal Dollars to support" them. *Id.* at 11,439. By enacting the rider, the sponsors proclaimed an intention to "send a message over the wall of the ivory tower of higher education" that the schools' "starry-eyed idealism comes with a price." *Id.* at 11,441 (Rep. Pombo).

Congress made no findings that the military was having trouble recruiting lawyers, or that these provisions would materially enhance recruiting results. It never even held hearings at which any information on the subject was presented. DOD, for its part, opposed the legislation as "unnecessary, duplicative, and potentially harmful to defense research initiatives." *Id.* at 11,440 (Rep. Underwood). A similar, discretionary statute was already in place, but had rarely been invoked because the schools' anti-discrimination policies had never had any deleterious impact on military recruiting. *See id.* at 11,441-42 (Rep. Schroeder).

Congress has revised the Solomon Amendment several times since 1994, each iteration threatening ever greater penalties for schools' continued adherence to their anti-discrimination policies. Congress has expanded the penalty to encompass not just DOD funds, but funds administered by almost every other federal agency that contracts with or gives grants to academic institutions, including the Departments of Health and Human Services, Education, Labor, Transportation, and Homeland Security. 10 U.S.C. § 983(d). Congress has further expanded the penalty beyond the offending school, to cover parent universities and all their components, so that a law school's policy could jeopardize the particle accelerator or cancer research across campus. *Id.* § 983(a). But until recently, the Solomon Amendment demanded nothing but "entry to campuses" and "access to students."

Law Schools Grant the Military Access Without Providing Full Assistance in Disseminating Its Recruiting Messages

The vast majority of law schools adjusted to the Solomon Amendment, albeit at times uneasily, by accommodating military recruiters to a degree. For the most part, they allowed military recruiters to enter their campuses and have

unfettered access to their students, and provided them, often reluctantly, with some assistance in disseminating their recruiting messages. But they reaffirmed their opposition to the military's discriminatory employment policy by declining to offer them the same degree of recruiting assistance they would offer employers who did not discriminate. App. 7a.

Harvard Law School, for example, allowed military recruiters on campus, to recruit at the offices of the Harvard Law School Veterans Association, but would not volunteer its career placement personnel to arrange the interviews. App. 7a. The University of Southern California Law School invited military recruiters to interview at the ROTC offices on campus, but did not invite them to the school-sponsored job fair off campus. App. 9a.

This uneasy détente lasted some seven years. Throughout that period, military recruiting did not suffer from law schools' refusal to give the military the same exact communications support it would give other employers. App. 7a-8a. Military recruiters routinely thanked law schools for the access and assistance they were granted and marveled over banner recruiting seasons. App. 7a-8a; *see, e.g.*, J.A. 241.

The Military Demands More Assistance in Disseminating Its Messages

In late 2001, the military changed its tune. It began enforcing an unwritten policy, reflected nowhere in the statute or supporting regulations, that expanded the degree of involuntary cooperation that military recruiters demanded from law schools. App. 8a. The JAG required law schools affirmatively to "provide[] military recruiters with the same level of assistance from its career development office (arranging interviews, posting notices, *etc.*) provided to other recruiters." App. 8a; *see, e.g.*, J.A. 130-31.

Nothing less than absolute parity would suffice. Recruiters threatened penalties even for the most symbolic efforts by law schools to treat the military's recruiting messages differently from those of non-discriminating employers. They would not brook, for example, a law school's commitment to provide them every service provided to nondiscriminating employers, but to do so through associated *college* career placement staff rather than *law school* staff. J.A. 150-53. The reason the JAG offered for this more stringent policy was that any differentiation would "'send[] the message that employment in the Armed Forces is less honorable or desirable than employment with other organizations.'" App. 9a (quoting J.A. 196).

Congress Amends the Solomon Amendment to Demand that Schools Help the Military Disseminate Its Recruiting Messages as Much as They Help Non-Discriminating Employers

In October, 2004, while this case was pending before the court of appeals—and in direct response to the district court's observation that the military was reading into the law a parity requirement that did not exist, *see* App. 181a-182a—Congress amended the Solomon Amendment once more, this time to adopt the military's unwritten policy demanding the same degree of assistance in disseminating its recruiting messages. The Solomon Amendment now requires that schools provide military recruiters access to campuses and to students "for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1).

Congress held no hearings to investigate whether military recruiting of lawyers was lagging, whether a demand for parity in affirmative support would make a difference, or whether other recruiting devices that did not trammel schools' rights might be more fruitful. This time, however, Congress did have the military's support. It came in the

form of a single letter from a DOD official. The letter did not document a need. Instead, it railed against "some colleges and universities [that] remain intransigent or outright opposed to compliance." H.R. Rep. No. 108-443, pt. 1, at 7 (2004) (reprinting Mar. 16, 2004 letter from Under Secretary of Defense David S. C. Chu). The "particularly egregious" examples it offered related not to military need, nor even to denied access, but to unwelcome protests: "[M]ilitary recruiters and prospective recruits have been forced to endure verbal abuse and harassment," at the hands of "gauntlets of taunting fellow students and faculty impeding the path" of potential recruits "to designated interview rooms." *Id.* This was the sole justification the military offered for the change requiring schools to provide full assistance in disseminating the military's recruiting messages.

Law Schools Challenge the Solomon Amendment

The Forum for Academic and Institutional Rights, a coalition of law schools and law school faculties, and the Society of American Law Teachers, filed suit along with several individual law professors, law students, and student organizations, in the U.S. District Court for the District of New Jersey. The plaintiffs filed a motion for a preliminary injunction against enforcement of the Solomon Amendment on First Amendment grounds.

The government submitted no evidence to justify its need for the Solomon Amendment, in any incarnation. App. 87a; *see also id.* at 45a. The district court declined to issue a preliminary injunction, however, concluding that the statute was not likely to be proven unconstitutional. App. 103a-184a.

The Court of Appeals Orders a Preliminary Injunction

The U.S. Court of Appeals for the Third Circuit reversed, ordering the district court to issue a preliminary injunction against enforcement of the Solomon Amendment. The court

of appeals conducted an exhaustive analysis of the First Amendment claims, and concluded, based upon the slim record before it, that the Solomon Amendment would likely not survive. App. 11a-48a. The court of appeals held that the Solomon Amendment impermissibly compels a school to use its personnel and resources to propagate the myriad messages associated with military recruiting, despite its objections to the military's exclusionary recruiting policies, App. 25a-40a; and that the Solomon Amendment burdens a school's right to expressive association by restricting its ability to teach its anti-discrimination commitment through a refusal to associate with employers whose recruiting policies it abhors, App. 15a-25a.

In the face of these intrusions on constitutional rights, the court of appeals applied strict scrutiny. The court observed that the current record contained "no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting," App. 45a, nor even "a shred of evidence that the Solomon Amendment materially enhances its stated goal," App. 24a. In fact, the court opined, it saw reason to believe that the Solomon Amendment "actually impedes recruitment." App. 24a. Moreover, the court held, "the Solomon Amendment could barely be tailored more broadly." App. 23a.

The court of appeals considered, and rejected, the government's argument that the Solomon Amendment should be analyzed under the intermediate scrutiny analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), which involves regulations of conduct with only an incidental impact on expression. App. 41a-43a. But the court also examined the statute under this lower standard, and concluded that the Solomon Amendment would fail that level of scrutiny as well, due to the absence of any evidence of military need or fit between the harm supposedly targeted and the remedy chosen. App. 43a-47a.

Judge Aldisert dissented. App. 48a-81a.

Other Lawsuits

Several similar lawsuits have been brought in other districts, none of them as preliminary injunctions. *See Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (granting summary judgment to plaintiffs); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (denying in part motion to dismiss; motion for summary judgment pending); *Burbank v. Rumsfeld*, No. Civ.A. 03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004) (denying in part motion to dismiss; motion for summary judgment pending). The only one of these cases decided on the merits to date has yielded a decision mirroring the Third Circuit's analysis, and a permanent injunction against the Solomon Amendment. *See Burt v. Rumsfeld*, 354 F. Supp. 2d at 174-87.

REASONS FOR DENYING THE PETITION

This certiorari petition takes an uncommon approach. In recognition of the principle that this Court is not a court of errors, most petitions argue that the case at hand presents a novel issue of law in need of this Court's guidance, even if the argument is a stretch. Not this petition. The government does not suggest that this case presents any novel issues, even arguably. As the government declares in its primary heading—"THE COURT OF APPEALS ERRED," Pet. 11 (capitalization in original)—the government's position is that the court of appeals applied standard constitutional doctrine and reached the wrong result, which is why the certiorari petition reads like a merits brief. *See* Pet. 10 (challenging opinion below as "flawed"); *id.* at 11 ("incorrect"); *id.* at 21 ("wrong").

The government, of course, does not believe that this Court should hear every case that one side or another believes is wrongly decided. So its petition boils down to the proposition that it is important to hear this preliminary injunction case now—without waiting for a factual record,

and without awaiting further percolation in the lower courts—because a preliminary injunction will harm military recruiting efforts, a proposition the court of appeals rejected as not substantiated by "a shred of evidence." App. 24a.

The Court should deny certiorari for two reasons. First, this case presents no novel issue; the court of appeals reached the right result, based upon a straightforward application of standard constitutional doctrine. In fact, it is the government's merits position that urges seismic departures from established law, on both the doctrine of unconstitutional conditions and the First Amendment. Second, review is inappropriate and unnecessary; neither the issue nor this case, in its preliminary injunction posture, is ripe for this Court's consideration, and there is no emergency to justify hearing the case at this point.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE SOLOMON AMENDMENT VIOLATES THE FIRST AMENDMENT, AND EACH OF THE GOVERNMENT'S CHALLENGES TO THE RULING AMOUNTS TO A REQUEST TO REVOLUTIONIZE A SETTLED AREA OF LAW.

A. The Solomon Amendment Imposes an Unconstitutional Condition on a School by Threatening a Withdrawal of All Federal Funds Unless the School Relinquishes Its First Amendment Rights.

Representative Solomon described the Solomon Amendment's construct aptly: It "tell[s] recipients of Federal money . . . that if you do not like the Armed Forces['] . . . policies, . . . that is your first-amendment right[]. But do not expect Federal Dollars . . . ." 140 Cong. Rec. at 11,439. Co-sponsor Representative Pombo captured the premise more succinctly: "their starry-eyed idealism comes with a price." *Id.* at 11,441.

The price is dear for a law school's right to stand by its anti-discrimination policy and to refuse to disseminate the

military's literature and give it access to the school's forums: The government cuts off virtually every penny of federal money to the law school and to any department within the university from Astrophysics to Zoology. If a law school faculty refuses to disseminate and support the military's recruiting message, the federal government will cancel not just funding for the law school, not just funding for recruiting, not just funding for national security or defense initiatives, but *any* federal funding to anyone on campus. So when the government describes the Solomon Amendment as covering "specified public funds," Pet. 3; *see also id.* at i (Question Presented), and as covering collaborations with defense, security, and intelligence agencies, as well as "other enumerated agencies," Pet. 4, that is the government's coy way of describing a penalty that encompasses all grants and contracts under the umbrella of every department that makes grants to academic institutions, including the Departments of Education, Health and Human Services, Labor, and Transportation, 10 U.S.C. § 983(d), and the various agencies under their umbrellas, such as the Centers for Disease Control and Prevention, the National Institutes of Health, and the Food and Drug Administration, to name a few. The price tag for some academic institutions is as high as several hundred million dollars. *E.g.*, J.A. 154.

More than four decades ago, this Court announced the principle that applies to this sort of condition: In the context of civil liberties, the government cannot attach strings to a benefit to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). This Court has never wavered from this fundamental articulation of the doctrine of unconstitutional conditions. It has consistently reinforced the proposition that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

To be sure, there have been refinements over the decades. But the refinements have centered around the context where the government creates a *program* and wishes "simply [to] insist[] that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *see United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 211 (2003). Even there, this Court has constrained the government's power to control the speech that emanates from its own programs. A public university can breathe life into a school newspaper, but may not forbid it to take a religious viewpoint. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). The government may create a public broadcasting system, but may not direct it to refrain from editorializing. *See FCC v. League of Women Voters*, 468 U.S. 364 (1984). The government may create a legal services program, but may not prohibit it from taking certain positions. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

Throughout, this Court has adhered to the core principle of the doctrine of unconstitutional conditions, that the government may not "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197 (emphasis in original). That is the principle that controls this case, for one simple reason: *There is no government program.* An entire university does not become a government program, much less a program obliged to carry the government's message, just because one of its professors or one of its departments collaborates with the government and secures federal support.

That is why the court of appeals had no trouble concluding that Congress could not condition the receipt of nearly all federal funds to an entire university on a law school's relinquishment of its First Amendment rights. *See*

App. 12a & n.9. (The district court applied the same principle, and simply reached a different result in its First Amendment analysis. *See id.* at 134a-139a.) Both courts understood that the question was whether Congress could impose the Solomon Amendment's requirements by command, for if the government could not constitutionally command compliance, then it could not penalize noncompliance by revoking millions of dollars of federal funding.

The government understood it, too. The government did not even suggest to the court of appeals—as it does to this Court—that the constitutional strictures were relaxed because "the Solomon Amendment is a condition on federal funding, and not a direct regulatory requirement." Pet. 21. To the contrary, the government acknowledged that "the scope of Congress's authority under the Spending Clause is not without limits, and one of the limits is the unconstitutional-conditions doctrine," which "prevents the government from requiring acceptance of an otherwise unconstitutional burden on expression as the price of federal funding." Gov't Br. at 44. True to the doctrine, the government addressed only the question whether "the burden imposed on [plaintiffs'] First Amendment interests is itself unconstitutional." *Id.*

The government now insists "[t]hat conclusion . . . is wrong," Pet. 21, and constructs much of its petition around the opposite view. *See* Pet. 3, 8, 10, 14-16, 20-22. According to the government's current position, the doctrine does not apply to a situation in which a private party has "voluntarily chosen to enter into grant agreements or contracts with the United States and to accept funds under them." Pet. 15 (emphasis omitted). As the government sees it, federal funds with strings attached are no different from any "contract" between private parties, in which one party makes demands which are "not justified," and the other party has the "option . . . to decline." Pet. 29.

That may have been a plausible position half a century ago. But the current law is that the government is an exception to the adage that whoever pays the piper calls the tune: "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velazquez*, 531 U.S. at 547. The government cannot blink away the entire doctrine simply by writing a 26-page petition that never once utters the phrase "unconstitutional conditions" nor even acknowledges the doctrine that bears that name.

In short, in holding that when constitutional rights are at stake, a penalty is to be treated the same as a command, the court of appeals merely applied the standard rule to an especially harsh penalty—a university-wide cutoff of all federal funds—which appears to be the single most draconian condition on rights this Court has ever confronted.

B. The Solomon Amendment Interferes with a School's Exercise of Its First Amendment Rights.

1. *The Solomon Amendment Violates the Doctrine of Compelled Speech by Forcing a School to Propagate, Accommodate, and Subsidize the Speech of Military Recruiters.*

This is what the Solomon Amendment demands on behalf of military recruiters: Distribute our brochures. Post our literature on your bulletin boards. Email your students about our imminent arrival. Maintain our announcements in your binders for students to review. Include our listing in your printed catalogs of career opportunities. Introduce us to individual students and coordinate logistics of where and when we can talk with them. Lend us interview rooms, where we can converse with students and tell them why they should join us. Reserve for us tables at information fairs where we can post "JAG Corps" banners and persuade students to join our ranks. *See* App. 27a-28a, 35a.

The court of appeals understood that these commands entailed co-opting an unwilling speaker to help disseminate the government's message, and demanding for government spokespersons a place in a school's private forum. For over 60 years, this Court has reiterated, in numerous different contexts, that, as the court of appeals put it, the government may not compel a private party to "propagate, accommodate, [or] subsidize" an unwanted message. App. 27a; *see United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

If, as this Court has held, the government cannot compel a private company to include an unwanted government-endorsed message in the envelope bearing its monthly bills, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12-16 (1986) (plurality opinion), then the government cannot force a private university to disseminate its literature either. If a state cannot force motorists to display a state motto on their license plates, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), then the government cannot force a private institution to display the military's literature on its bulletin boards. If the government may not force a parade organizer to include an unwanted contingent bearing "a message it did not like," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 574-81 (1995), then the government may not force a private forum to admit an unwanted contingent of recruiters to unfurl its banner at an information fair. If the government may not force mushroom farmers to contribute a penny per pound to a fund supporting generic advertising that promotes their products, *United Foods*, 533 U.S. at 408-09, and cannot force non-union members to pay a few dollars to support the political activities of unions, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-35 (1977), then the government may not command that a private law school expend its resources promoting a recruiting message that it finds deeply offensive. Far from being a novel application of these precedents, the court of appeals' holding was virtually foreordained.

The government scarcely grapples with any of these precedents. Instead, it purports to offer several grounds on which to distinguish this case. But the doctrine is so old, and the circumstances in which it has been applied so varied, that every distinction the government offers has already been considered—and rejected—by this Court numerous times.

First, the government argues that the military "does [not] ask the institutions to adopt the statements made by military recruiters as their own," Pet. 10, that law schools will not be mistaken as endorsing the military's message, Pet. 13, and that they are "free to protest the military's policies," Pet. 10; *see also id.* at 15 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980)). As the court of appeals explained at length, these have never been defenses to a compelled-speech claim. *See* App. 36a-39a. The offended motorist was not forced to adopt the state motto as his own, *see Wooley*, 430 U.S. at 715, and (as noted in the dissent) no one would ever have mistakenly viewed him as endorsing it, *id.* at 719-22 (Rehnquist, J., dissenting); and the utility company was not forced to adopt the literature enclosed in its billing envelopes as its own and was free to protest it, *Pac. Gas & Elec.*, 475 U.S. at 15 n.11. Yet, this Court found these forced messages unconstitutional, observing that it was constitutionally irrelevant that the speaker can "tailor [his other] speech to [the government's] agenda," or issue a disclaimer that "avoid[s] giving [listeners] the mistaken impression that [the government's] words are really those of [the speaker]." *Id.* at 10, 15 n.11; *see also id.* at 12 & n.8.

Second, the government contends that its recruiting message is not, in fact, "antagonistic" to the law schools. Pet. 14-15 (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-71 (1997)). Initially, there is no such requirement where, as here, private citizens take the position that they are being forced to disseminate messages they do not wish to disseminate. That is why this Court held, for example, that PG&E could assert a blanket right to resist the

government's command to put *any* message into its billing statements (without parsing each proposed message for antagonistic views), *see Pac. Gas & Elec.*, 475 U.S. at 14-15, and why a worker can refuse to support *any* political activities by a union (without having to specify which were antagonistic), *see Abood*, 431 U.S. at 235.

But even if there were an antagonism requirement, it would easily be met in this case, especially in light of this Court's observation that even a "disagreement [that] could be seen as minor" is constitutionally significant. *United Foods*, 533 U.S. at 411. If, as this Court has held, the courts must defer to a mushroom grower's claim that advertisements generally promoting mushrooms are antagonistic to its interest in promoting the message that its brand is superior, *id.*, then any threshold showing of antagonism must be low indeed, and the law schools easily meet it. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

The Solomon Amendment forces the law school to violate its own policy and actively support military recruiters who come onto campus to engage in the very discriminatory hiring practices that the law school condemns. That is true whether or not the interview ever turns to "Don't Ask, Don't Tell." But certainly, when the recruiter at a law school information fair tells a law student, "Sorry, Son, it doesn't matter how smart you are, you are ineligible to serve your country as a lawyer, because you are gay," *see* J.A. 107, he is doing more than "simply report[ing] an objective fact about the qualifications for military service," Pet. 15. He is propagating a message of discrimination, and he is doing it in a forum sponsored by an institution that has foresworn any support for those who discriminate. That is the very definition of antagonism.

Even the government's diluted rendering of the resulting message—that schools are forced merely to "convey . . . the message that the law school *treats* [all] prospective employers equally," regardless of whether they discriminate

or not, Pet. 14 (emphasis in original)—contradicts the law school's stated stance. As the court of appeals understood, the law school's position is that discrimination is intolerable, and it will never actively abet an employer who discriminates. App. 32a-33a. The lesson the law school wants to inculcate is that employers who discriminate should *not* be treated the same as those who do not.

Third, the government asserts that speech is not "compelled" here, because the requirement is couched in terms of a condition rather than a command. Pet. 15-16. This is just another version of the unconstitutional conditions argument, this time presented as the position that the doctrine applies only to suppression cases, but not to compulsion cases. But this Court has always treated compelled speech as the flip side of the same First Amendment coin. *See Wooley*, 430 U.S. at 714; *Hurley*, 515 U.S. at 573. The doctrine of unconstitutional conditions is no exception. Indeed, the doctrine was born in the context of a compelled speech case: The government tied a tax benefit to a veteran's willingness to sign a loyalty oath. *Speiser*, 357 U.S. at 514-15. No one commanded the veteran to affirm his loyalty; it was required only if he wanted the extra few dollars. The compulsion was unconstitutional there, and it is here.

2. *The Solomon Amendment Infringes on a School's Right of Expressive Association by Forcing It to Associate with Military Recruiters Who Engage in Discriminatory Practices the School Abhors.*

In holding that the Solomon Amendment violates a law school's right of expressive association, the court of appeals correctly identified the tension between the law school's expressive right and the forced accommodation of, and support for, the military's recruiting activities on campus: "The [law] schools believe that, by coordinating interviews and posting and publishing recruiting notices of an employer who discriminates on the basis of sexual orientation, they

impair their ability to teach an inclusive message by example." App. 16a-17a. The court of appeals understood that it had to "'give deference to an association's view of what would impair its expression,'" App. 20a (quoting *Dale*, 530 U.S. at 653), and found ample reason to follow that rule here.

This holding, too, was far from novel. As the court of appeals explained at length, it flowed directly from this Court's rulings on expressive association, most recently *Boy Scouts of America v. Dale*, and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.

In *Dale*, the Boy Scouts asserted a right to exclude a gay assistant scoutmaster, despite an anti-discrimination law prohibiting the discharge. 530 U.S. at 656. This Court upheld the Scouts' right to exclude the scoutmaster, because they claimed the forced inclusion of the scoutmaster interfered with their ability to teach their moral values both directly and by example. *Id.* at 648. His "presence in the Boy Scouts," this Court held, "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. This Court found a constitutional violation even though the scoutmaster had never used his position to advocate or teach any lesson that varied from the core Scouts curriculum. *Id.* at 688-93 (Stevens, J., dissenting).

In *Hurley*, the organizers of a St. Patrick's Day parade wanted to exclude a contingent of marchers that wished to carry a gay pride banner conveying "a message [the organizers] did not like." 515 U.S. at 574. They, too, confronted an anti-discrimination law. This Court found that the organizers had a First Amendment right to reject the contingent, even though they had never conceived of the parade as transmitting any particular message and they had no set criteria for participation in the parade. *Id.* at 562.

As the court of appeals concluded, these cases leave no doubt that the Solomon Amendment violates the law schools' rights of expressive association. App. 15a-22a. Law schools have established an even stronger right to exclude the unwelcome messenger from their forum than either the parade organizers or the Boy Scouts. Unlike the parade organizers, the law schools had formally articulated their policy and measured every participant by it. Unlike the offending messenger in *Dale*, the offending messenger here comes on campus to articulate the very message and engage in the very act (of discrimination) that the law schools object to. Unlike both cases, here the government is forcing the expressive association not only to tolerate the message, but to help disseminate it affirmatively.

Once again, the government's main argument is that the right must be narrowed, and once again it offers a narrowing construction that this Court has rejected. The government suggests that that doctrine is inapplicable here, because "the Solomon Amendment . . . does not establish criteria for the selection of administrators, faculty, or students," and "[r]ecruiters are not part of the institution itself and do not become members through their recruiting activities." Pet. 11-12. This taxonomy fails to account for *Hurley*, which had nothing to do with membership, but, like this case, was purely about the forced inclusion of a speaker with whom the sponsor of a forum did not want to associate. *See* 515 U.S. at 572-73.

Similarly off base is the government's repeated assertion that "the Solomon Amendment simply seeks to put military recruiters in the same position as other employers." Pet. 13. As a factual matter, that is false: No other employer can enjoy a law school's recruiting assistance without certifying that it does not discriminate. As a matter of doctrine, the right to resist a government-compelled association does not depend upon whether the resisting institution is otherwise choosy. *See Hurley*, 515 U.S. at 574.

Finally, contrary to the government's claim, there is nothing in this Court's *anti*-discrimination jurisprudence that justifies a requirement that private institutions accommodate and support *discrimination*. *See* Pet. 12, 23-24. In the anti-discrimination cases, such as *Grove City College v. Bell*, 465 U.S. 555 (1984), and *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Court upheld laws that allocate federal funds only to schools that afford their students equal educational opportunities without regard to race, gender, and other forms of invidious discrimination. These cases came out the way they did because the government's compelling interest in combating discrimination outweighed any constitutional right an institution might claim to engage in invidious discrimination. *See Bob Jones Univ.*, 461 U.S. at 604. Indeed, the Court invoked cases dating back some 40 years, recognizing that providing material assistance to an institution that discriminates is itself a constitutional violation. *See id.* at 593-94 (citing *Norwood v. Harrison*, 413 U.S. 455 (1973)).

The government's justification for the Solomon Amendment is obviously not that it has a compelling interest in combating discrimination by private institutions, nor that it has a compelling interest (indeed, a constitutional duty) to ensure that federal funds do not support bigots. Here it is the government that is discriminating and the private institutions that resist abetting. The government's justification is that it needs to co-opt law school mechanisms of communication and personnel to advance its own recruiting messages. *E.g.*, Pet. 18. That justification must be addressed on its own merits—and it will be, *see infra* at 26—but no amount of verbal gymnastics can convert the Solomon Amendment from a statute designed to promote the military's exclusionary recruiting message into some sort of anti-discrimination law designed to "secure equal access to employment opportunities for . . . students." Pet. 12.

C. The Solomon Amendment's Infringements on Speech and Associational Rights Fail Constitutional Scrutiny.

1. *The Solomon Amendment Is Subject to Strict Scrutiny.*

Because the Solomon Amendment requires law schools to disseminate the government's message, and requires them to suspend their expressive policies of not hosting or abetting discriminating employers, the court of appeals correctly applied strict scrutiny. App. 22a-24a, 39a-40a; *see Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1996). The government does not suggest for a moment that the Solomon Amendment would survive strict scrutiny. Instead, it renews its argument that intermediate scrutiny applies under *United States v. O'Brien*, 391 U.S. 367 (1968), an argument the court of appeals correctly rejected. App. 41a-43a.

The federal law at issue in *O'Brien* was directed at anyone "who . . . knowingly destroys" or "knowingly mutilates" a draft card. 391 U.S. at 370. The purpose of the prohibition against destroying a draft card, this Court observed, was to ensure that eligible men always had their draft cards at the ready, *id.* at 378-80, and the penalty applied whether the card's holder privately tossed it in the incinerator or burned it publicly in protest, *id.* at 376, 378. In the latter context, the Court acknowledged, the law had an incidental effect on speech. *Id.* at 376. But the law on its face was not directed at speech, *id.* at 375, and its focus was on the destructive conduct, on a purpose that was unrelated to expression, *id.* at 379-80. The Court has since etched these two elements in doctrine as prerequisites to the application of *O'Brien*'s intermediate scrutiny standard for laws regulating conduct. *See Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

The court of appeals correctly concluded that this test is not applicable to the Solomon Amendment. App. 41a-43a. It invoked *Dale*'s analysis that when the law in question "'directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection[,] . . . *O'Brien* is inapplicable.'" App. 43a (quoting *Dale*, 530 U.S. at 659); *see also Wooley*, 430 U.S. at 713 & n.10 (holding that the compelled-speech doctrine, and not the *O'Brien* analysis, is the "more appropriate First Amendment ground[]" to examine the compulsory display of state motto on license plates).

Moreover, as the court of appeals understood, the Solomon Amendment is directed purely at expression. App. 27a-29a. The statute does not demand that schools provide the military access to campus and affirmative support to search for bombs or to root out terrorists. It demands the schools' support "for recruiting." App. 2a. That purpose is not "unrelated to expression," *Spence*, 418 U.S. at 414 n.8; it *is* expression. App. 28a ("[R]ecruiting necessarily involves 'communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes'—the hallmarks of First Amendment expression." (quoting *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980))). While it is possible to incinerate a draft card or commit "arson of a government building," Pet. 17, without expressing a thing, it is impossible to "recruit" without a message. By definition, as the government acknowledges, "recruiters speak for the employers they represent." Pet. 13.

When the government repeatedly defines the "conduct" in question as the "denial of equal access to military recruiters," Pet. 16; *id.* at 22 (same), it elides the critical fact that what the military demands "access" to are the school's forums and vehicles of communication. The military demands "equal access" to bulletin boards, mail boxes, email systems, printed catalogs, and information fairs, only in the

same sense that a candidate demands "equal access" to an op-ed page, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243-44 & n.1 (1974), an advocacy group demands "access" to a utility's billing envelopes, *Pac. Gas & Elec.*, 475 U.S. at 14-15, or a gay pride contingent demands "equal access" to a parade, *Hurley*, 515 U.S. at 561. To say that "[t]here is nothing inherently communicative about [this] conduct," Pet. 16, is like saying there is nothing inherently belligerent about a punch. The government's definitions of "communication" and "conduct" defy not just the English language but decades of precedent.

2. *The Solomon Amendment Cannot Survive Strict Scrutiny or Intermediate Scrutiny.*

The government's whole *O'Brien* discussion is academic anyway, because the court of appeals correctly found that the Solomon Amendment would fail even intermediate scrutiny. Intermediate scrutiny demands not just that the governmental interest be "important," but also (1) that the statute or policy actually "further[]" the interest; and (2) that "the incidental restriction on alleged First Amendment freedoms [be] *no greater than is essential* to the furtherance of that interest." *O'Brien*, 391 U.S. at 377 (emphasis added).

There is no question that government's interest in raising an army is important, even compelling, *see* U.S. Const. art. I, § 8, cl. 12; and so, too, we can presume, is its interest in hiring JAG lawyers. But under either standard of review, the government cannot "simply posit the existence of the disease sought to be cured." *Turner*, 512 U.S. at 664 (plurality opinion) (citation omitted); *see Rostker v. Goldberg*, 453 U.S. 57, 89 (1981) (Marshall, J., dissenting) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to . . . remove constitutional limitations safeguarding essential liberties." (citation omitted)). "It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664 (plurality opinion).

These standards apply with equal force "when [Congress] acts in the area of military affairs." *Rostker*, 453 U.S. at 67; *cf. Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (military powers of the Executive do not supersede constitutional protections for individual rights).

As the court of appeals observed, faced with the requirement of *proving* that the Solomon Amendment is necessary to further the asserted interest, the government came up empty-handed. "The Government . . . failed to proffer a shred of evidence" that the military needs to force its way into private forums—much less co-opt others to disseminate its message—in order to recruit lawyers effectively. App. 24a. The government did not offer the district court even a single affidavit attesting to the special need that warrants an intrusion on liberty, much less the sort of evidence that can satisfy a court "that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner*, 512 U.S. at 666. Instead, the government argued, as it does now, that it did not need to produce a shred of evidence because the proposition is "common sense." Pet. 19.

Common sense does not prove that there was an attorney recruiting problem the military needed to solve, especially in the face of a record that demonstrates the opposite. From the DOD's opposition to the statute in the first instance, *see* App. 91a-92a & n.2 (quoting 140 Cong. Rec. at 11,440-41), to the effusive thanks of top JAG officers who for years were admitted on campus, but denied absolute parity in treatment, *see* J.A. 130, 234-35, to the military's reports of the glut of highly qualified applicants even when many schools were denying it affirmative assistance, *see* App. 7a-8a; *id.* at 99a-100a, the military, itself, has furnished ample evidence that the incursion on First Amendment freedoms was never necessary to recruit qualified lawyers.

Nor does common sense prove that the Solomon Amendment would address any such problem. As the court

of appeals suspected, "the Solomon Amendment, which has generated much ill will toward the military on law school campuses, actually impedes recruitment." App. 24a (footnote omitted). "In this context," the court of appeals concluded, "it is hardly 'common sense,' as the military alleges, that its presence on campus amidst such commotion and opposition has aided its recruitment efforts." App. 46a.

Common sense also does not prove that the various alternative recruiting methods the military has at its disposal would be inferior. The military can make use of its access to student names and address information, 10 U.S.C. § 983(b)(2), and send them recruiting materials directly. It can participate in recruiting events and symposia not sponsored by law schools, or conduct its own. The military can offer irresistible financial incentives to potential recruits, in the form of loan repayment and tuition remission, and can purchase media advertising (as it already does) on a scale that is beyond the capacity of virtually any other employer. App. 23a. As the court of appeals noted, these other approaches "might actually fare better than the current system," App. 24a, which is why the court of appeals concluded that "the Solomon Amendment could barely be tailored more broadly." App. 23a.

Apart from common sense, the government offers two other purported substitutes for record evidence. First, the government argues that "to the extent anything more than common sense is required to support" the Solomon Amendment, "Congress's judgment in enacting the funding condition furnishes that support." Pet. 19. But the government is incorrect when it purports to find in the mere fact of the enactment a "judgment that a crucial component of an effective military recruitment program is equal access to college and university campuses." Pet. 9. Since Congress failed to promulgate any legislative findings of fact, or even to hold hearings by which to ascertain facts, no such judgment can be gleaned from the enactment of the Solomon

Amendment. *Cf. United States v. Morrison*, 529 U.S. 598, 614 (2000) (even "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of . . . legislation"). It is more likely that Congress was responding to the imperative to fire a shot "'over the wall[s] of the ivory tower,'" App. 5a (quoting 140 Cong. Rec. at 11,441), than to any assessment of military need.

Second, the government tries to escape its burden by asserting that "the Solomon Amendment relies on the educational institutions' own assessments of what is *required* for effective recruiting on their campuses." Pet. 18 (emphasis changed). When law schools choose to expend their scarce resources to promote certain employers, that is not a judgment of what is "required" for any particular employer to recruit effectively, and it certainly is not a judgment of what assistance is "integral" to an extraordinarily well-financed military. Pet. 18. It is simply a judgment to associate with, and promote, one group of employers and not another. That judgment cannot support the government's demand for like treatment any more than a newspaper's judgment to allot editorial space to some candidates entitles others to insist that equal space is "required." *See Tornillo*, 418 U.S. at 256-57.

II. IMMEDIATE REVIEW IS INAPPROPRIATE AND UNNECESSARY.

Beyond the absence of any cert.-worthy issue, there are other reasons to deny review, and no compelling reason to grant it.

First, the Third Circuit was the first court of appeals to examine the constitutionality of the Solomon Amendment. Other circuits have not yet had an opportunity to address the issue. In particular, the Second Circuit will presumably hear an appeal of a permanent injunction imposed by the District of Connecticut. Another case may well be on its way to the Second Circuit shortly. And a fourth case, pending in the

Eastern District of Pennsylvania, could present the Third Circuit with another opportunity to consider the case on a fuller record. *See* cases cited *supra* at 8. As the issue percolates, review could be obviated because the courts of appeals may agree that the Solomon Amendment is unconstitutional. *See* Sup. Ct. R. 10(a); *Miroyan v. United States*, 439 U.S. 1338, 1338-39 (1978) (Rehnquist, J., in Chambers).

Second, this case does not present a suitable vehicle for review. All preliminary injunctions are preliminary—but this one is even more so than usual. As we have seen, "[t]he Government . . . failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal." App. 24a. Nor did the government proffer a shred of evidence to demonstrate that Congress was addressing an actual recruiting problem in the first place. App. 45a.

The government has hinted at an excuse, that it had only a week to respond to the preliminary injunction motion. Pet. 6. In truth, nearly seven weeks elapsed between the filing of the preliminary injunction motion and the district court's decision, during which time the government did not hesitate to supplement its various responses. So it is debatable whether the slimness of the evidentiary record is attributable to the preliminary nature of the proceeding or to a more fundamental reality that the justification is unprovable. What is not debatable is that the government has the information by which both parties can test the truth of its assertions of need. But that evidence will not be presented or assessed until the next phase of the litigation progresses.

Typically, these attributes compel a denial of certiorari. The government would have to make an extraordinary showing to justify a request that this Court reach out to take this case when all the traditional criteria are lacking. Here, too, the government fails. The government's petition comes down to a single assertion: there is a "pressing need" for this Court to review this case, Pet. 24, because enjoining the Solomon Amendment "would undermine military recruit-

ment during a time of war," Pet. 10. This is the very proposition that the court of appeals rejected as inconsistent with the evidence.

The record reflects that the Solomon Amendment has never been about military necessity, which is why the military initially opposed it, why the sponsors justified it as retribution for disloyalty more than as a necessary measure to address a real problem when all other measures failed, and why JAG recruiting officers consistently marveled at the glut of highly qualified applicants, *see* App. 99a-100a, even when virtually all schools were denying them the parity of treatment the government now demands.

Indeed, the military interests served by enforcement of the Solomon Amendment are so insubstantial that it is hard to escape the conclusion that the only battle Congress and the Armed Forces are waging in this instance is a *Kulturkampf*. It is unclear whether this sort of pique could ever rise to the level of an "important question of federal law." Sup. Ct. R. 10(c). What is clear is that it does not qualify as an emergency.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WARRINGTON S. PARKER, III
PETER E. GRATZINGER

HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

E. JOSHUA ROSENKRANZ*
SHARON E. FRASE
JEAN-DAVID BARNEA

HELLER EHRMAN LLP
120 West 45th Street
New York, NY 10036
(212) 832-8300

*Counsel of Record

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In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE PETITIONERS

Respondents oppose the government's petition for a writ of certiorari on two grounds. First, they argue that the court of appeals reached the correct result under this Court's decisions. Br. in Opp. 9. Second, they argue that the case is not ripe for review because it arises at the preliminary injunction stage. *Ibid.* Both contentions are without merit.

The court of appeals enjoined the application of an Act of Congress by identifying a constitutional right of institutions of higher education to receive federal funding to support their educational programs, while simultaneously denying federal recruiters equal access to their students. Pet. App. 11a-15a. That holding is not only incorrect; it is inconsistent with the very decisions on which the court relied. Moreover, the condition on the receipt of federal funds that respondents challenge is modest and precisely tailored to further the government's compelling interest in recruiting the highest caliber candidates for essential military positions. The condition does not affect the relationship of an institution of higher education with anyone except the federal government itself, and it is therefore merely one aspect of their bilateral agreement. The United States is doing no more than any donor to or contractor with a university might reasonably

do: if the university wants its support for the education of the university's students, the United States wants fair treatment in return by being afforded equal access to recruit those students for future employment.

Nor should the Court delay granting certiorari until some indefinite time in the future after a final judgment has been issued by the district court, and the court of appeals has completed its review of that judgment. The Court has repeatedly granted certiorari to review court of appeals decisions that have required an Act of Congress to be preliminarily enjoined on constitutional grounds. Pet. 24. It should do so again here, particularly since the question presented concerns the power of Congress to recruit military personnel during a time of war.

A. The Solomon Amendment Is Not Subject To Strict Scrutiny

1. Respondents argue (Br. in Opp. 14) that the court below correctly relied on *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986), *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), in holding that the Solomon Amendment violates the compelled speech doctrine. In *Pacific Gas*, the Court invalidated a state commission's order that required a public utility to include the messages of another speaker in its billing envelopes. 475 U.S. at 12-16. In *Wooley*, the Court held unconstitutional a state law that required motorists to display the state motto on their license plates. 430 U.S. at 717. And in *Hurley*, the Court invalidated a state law that required a parade organizer to allow a group of individuals to display a message in the parade that the parade organizer did not wish to include. 515 U.S. at 574-581. Those decisions undermine, rather than support, the court of appeals' holding.

First, in each case, the government *directly mandated* a party to convey someone else's point of view. *Pacific Gas*, 475 U.S. at 6-7; *Wooley*, 430 U.S. at 707; *Hurley*, 515 U.S. at

561. In contrast, the Solomon Amendment does not compel anything. Institutions of higher education that do not wish to provide equal access to military recruiters may decline federal assistance. Cf. *Westside Cmty. Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 241 (1990).

Second, in each of the three cases, the government directive forced a party to convey views with which that party disagreed. *Pacific Gas*, 475 U.S. at 17 (utility required to "spread[] a message with which it disagrees"); *Wooley*, 430 U.S. at 707 (parties consider state motto "to be repugnant to their moral, religious, and political beliefs"); *Hurley*, 515 U.S. at 574 (parade organizer "clearly decided to exclude a message it did not like"). That precondition for application of the compelled speech doctrine is not present here. Respondents object to the military's "Don't Ask, Don't Tell" policy. Br. in Opp. 16. But that is an objection to what the military *does* in accordance with 10 U.S.C. 654, not to any view that the Solomon Amendment seeks to promote. Neither the Solomon Amendment nor the military's recruiters seek to promote the government's point of view on the "Don't Ask, Don't Tell" policy. Instead, consistent with the objectives of the Solomon Amendment, military recruiters provide factual information on military service and encourage interested students to pursue military careers.

Third, the government directives in *Pacific Gas*, *Wooley*, and *Hurley* sought to alter what was communicated in a forum or on property that the enlisted party had dedicated to its own expression or personal use. *Pacific Gas*, 475 U.S. at 5, 17-18 (utility required to use envelope containing its newsletter and bill to disseminate opposing party's views); *Wooley*, 430 U.S. at 715, 717 n.15 (motorist required to display state motto on personal property used in his daily life and with which he was closely associated); *Hurley*, 515 U.S. at 572-573 (parade organizer required to alter expressive content of its own parade). The Solomon Amendment, by contrast, seeks to induce institutions of higher education to

give the military access to a forum that the institutions have created for outside employers whose viewpoints they do not endorse. And it concerns an economic activity—employment—that is traditionally subject to governmental regulation even in the university setting. See, *e.g. University of Pa.* v. *EEOC*, 493 U.S. 182 (1990); Pet. 12. The statute at issue in *Hurley* also created a danger that the views of unwanted speakers would be attributed to the parade organizer. 515 U.S. at 576-577. The Solomon Amendment creates no such danger. Students and the public both can readily understand that military recruiters, like all recruiters, speak for their employers, not for the institution. Cf. *Mergens*, 496 U.S. at 250-252 (opinion O'Connor, J.).

Thus, the Solomon Amendment does not have any of the characteristics that implicate the compelled speech doctrine: It does not involve compulsion; it does not seek to promote a message with which institutions of higher education disagree; it does not seek to affect what is communicated on space or property that is reserved for the institutions' own expression or personal use; and it does not create a danger of misattribution. Far from supporting application of the compelled speech doctrine to the Solomon Amendment, *Pacific Gas*, *Wooley*, and *Hurley* demonstrate that the compelled speech doctrine has no application here.

For similar reasons, respondents err in relying on *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), and *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). In *United Foods*, the Court held that mushroom growers could not be compelled to pay an assessment for generic advertising of mushrooms. 533 U.S. at 413-416. In *Abood*, the Court held that workers could not be required to pay a fee to support the ideological speech of unions. 431 U.S. at 234-235. Both cases involved a direct mandate to pay an assessment for the promotion of a viewpoint to which the assessed party objected, and the Court held that the party must have a right to opt out of the assessment. See *United Foods*, 533

U.S. at 411 (parties object to message that mushrooms are worth consuming whether or not they are branded); *Abood*, 431 U.S. at 235 (workers have right to withhold support for ideological causes to which they object). The Solomon Amendment has none of those characteristics: it does not impose a direct mandate, but rather allows educational institutions to opt out by declining federal financial assistance; it does not assess a fee; and it does not promote an objected-to viewpoint. Respondents' reliance on the principle from those cases—that a party cannot be required to subsidize private speech to which it objects—is particularly unconvincing when it is the United States that is subsidizing institutions of higher education, rather than the other way around, and when the government is seeking access that institutions already provide to other employers without charge.

Finally, respondents mistakenly rely on *Speiser* v. *Randall*, 357 U.S. 513 (1958). In that case, which the Court decided on procedural due process not First Amendment grounds, see *id.* at 517 & n.3, the Court adverted to the First Amendment issue raised by a state law that increased taxes (by withdrawing an exemption) on persons for engaging in certain speech, where the law was "frankly aimed at the suppression of dangerous ideas." *Id.* at 519 (internal quotation omitted). The Solomon Amendment does not increase the taxes of those who fail to satisfy a condition; it withholds federal funding from those who would deny equal access to federal employers. And the Solomon Amendment does not aim at the suppression of dangerous ideas; it is aimed solely at an institution's *conduct* in denying equal access to military recruiters.

2. Respondents seek to defend the Third Circuit's holding that the Solomon Amendment intrudes on the right to associate (Br. in Opp. 17-20) based on *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), and *Hurley*. Neither case, however, supports the court of appeals' extraordinary notion

that an institution may voluntarily associate itself with the government's money to obtain support for educating its students, and then turn around and claim a constitutional right not to associate with the government when the government seeks to recruit the students the institution has educated.

Dale involved a governmental intrusion on the ability of the Boy Scouts to determine its own internal leadership, and that intrusion created an unacceptable danger that scouts and the public would attribute views to the organization that it did not have. 530 U.S. at 653-654. Here, in contrast, the Solomon Amendment does not seek to prescribe an institution's leadership, and there is no danger that the public will attribute to the institution any views expressed by military recruiters. Similarly, the statute in *Hurley* required the objecting party to include an unwanted message in its own expressive activity, and there was an unacceptable danger that the unwanted message would be attributed to the objecting party. Neither of those circumstances is present here.

The Solomon Amendment does not intrude on the right to association recognized in *Dale* and *Hurley* for the additional reason that it involves a condition on federal assistance, not a regulatory requirement. If universities do not wish to associate with military recruiters, they may simply decline to associate themselves with the government's money.

The Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), demonstrates that when a party voluntarily accepts federal money, it may not claim that the conditions on the receipt of that money violate the First Amendment right to associate. In that case, the Court unanimously rejected a college's claim that Title IX's prohibition against discrimination on the basis of sex in programs that receive federal financial assistance violated the college's right to associate. The Court explained that Congress is free to establish reasonable conditions on the receipt of federal assistance and that the college could avoid the conditions by declining federal assistance. *Id.* at 575-576.

Respondents characterize *Grove City* as resting on the conclusion that the funding condition was narrowly tailored to further the government's compelling interest in combating gender discrimination. Br. in Opp. 20. But respondents do not cite any language from *Grove City* supporting that reading, and with good reason. *Grove City* did not uphold the funding condition under heightened scrutiny. Instead, the Court upheld the condition because it did not intrude on the right to associate in the first place. 465 U.S. at 575- 576.

B. The Solomon Amendment Is Not Subject To, But In Any Event Satisfies, Intermediate Scrutiny

Respondents accuse the government of arguing that the Solomon Amendment should be subjected to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). Br. in Opp. 21. The government, however, does not make that argument. To the contrary, the government argues that the Solomon Amendment should not be subjected to *O'Brien*'s intermediate scrutiny standard, both because *O'Brien* applies to mandatory requirements, not to funding conditions, and because a university's denial of equal access to military recruiters involves conduct, not expression protected by the First Amendment. See Pet. 16-17.

If the Court were to conduct an analysis under *O'Brien*, however, the Solomon Amendment would readily be sustained under that analysis. Respondents argue that because the Solomon Amendment seeks to induce access for recruiting, its purpose is not unrelated to expression. Br. in Opp. 22. The proper question under *O'Brien*, however, is whether the purpose of the legislation "is unrelated to the *suppression* of free expression." *O'Brien*, 391 U.S. at 377 (emphasis added); see, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994). Here, the interest underlying the Solomon Amendment—seeking equal access to recruitment opportunities to further military preparedness—is manifestly unrelated to the suppression of expression.

Respondents also seek to defend the Third Circuit's holding that *O'Brien* requires a specific evidentiary showing on the military's need for recruiting access to campuses. Br. in Opp. 23-26. But Congress is not required to conduct empirical studies before reaching the common-sense conclusion that personal access to students on campus furthers recruitment. If on-campus recruiting were not effective, employers would not seek such access, and institutions would not provide it. Moreover, by establishing a standard of *equal* access, Congress reasonably relied on an educational institution's own assessment of what degree of access prospective employers need for effective recruiting.

C. The Unconstitutional Conditions Doctrine Does Not Support The Court Of Appeals' Decision

Respondents argue that the doctrine of unconstitutional conditions renders it immaterial that the Solomon Amendment imposes a condition on federal funding, rather than a mandatory requirement. Br. in Opp. 9-13. According to respondents, under that doctrine, Congress may not seek to achieve through a funding condition what it could not command directly. *Id.* at 10. That argument is inconsistent with *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), a case that respondents do not cite, much less discuss. In that case, the Court held that Congress has authority to establish criteria for the receipt of federal funding "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 588.

Congress's authority under the Spending Clause is not without First Amendment limits. But, in general, those limits are exceeded only when Congress aims "at the suppression of dangerous ideas." *National Endowment for the Arts*, 524 U.S. at 587 (citations omitted). Thus, in the only two cases cited by respondents in which the Court invalidated a federal funding condition, it did so because Congress was aiming at the suppression of ideas. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 548-549 (2001) (viewpoint-based funding restriction on legal services violated First Amendment because "Congress'[s] antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest") (citations omitted); *FCC* v. *League of Women Voters*, 468 U.S. 364, 383-384 (1984) (law prohibiting "editorializing" by public broadcasting grantees violated First Amendment because it was motivated by "desire to curtail expression of a particular point of view on controversial issues of general interest"). The other cases relied on by respondents also involve efforts to suppress ideas. See *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830-831 (1995) (university's failure to fund religious publications was an attempt to suppress particular point of view in funding forum); *Speiser*, 357 U.S. at 519 (withholding of tax exemption was "aimed at the suppression of dangerous ideas") (citation omitted); see also *Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972) (public college's refusal to renew employment contract would violate First Amendment if based on employee's criticism of college administrators). Because the Solomon Amendment seeks to induce institutions of higher education to provide equal access to military recruiters, and does not aim at the suppression of ideas, the unconstitutional conditions doctrine has no application here.

D. This Case Is Ripe For The Court's Review

Respondents suggest three reasons that the case is not ripe for review, but each is unpersuasive. Respondents first argue that the Court should not grant review because only one court of appeals has addressed the constitutionality of the Solomon Amendment. Br. in Opp. 26-27. Review is warranted in this case, however, because the government has been enjoined from enforcing an Act of Congress on constitutional grounds and because that Act concerns a matter of vital importance—recruitment of military personnel during a time of war. And respondents themselves, far from limiting this case to the Third Circuit, have given the case a far broader sweep by bringing it on behalf of law schools and

law school faculties in California and elsewhere in the Nation, as well as a nationwide association of 900 professors and individual professors both inside and outside the Third Circuit. See Pet. 7 n.2; Pet. App. 84a-86a, 103a-128a. Those considerations strongly support review in the absence of a circuit conflict, and they make it imperative that review take place now rather than at some undefined point in the future.

Second, respondents argue that review is unwarranted because this case is at the preliminary injunction stage. Br. in Opp. 27. But this Court has repeatedly granted certiorari to review a lower court decision preliminarily enjoining an Act of Congress on constitutional grounds. See Pet. 24. Respondents have noticeably failed to respond to the government's showing that this Court routinely grants review in such circumstances.

Finally, respondents argue that this case should await further proceedings because the government has not presented evidence to the district court on the need for equal campus access. Br. in Opp. 27. But no such proceedings are necessary to resolve the purely legal questions presented by the government's petition. See Pet. 25-26. If the Court agrees with the government that the Solomon Amendment should not be subjected to strict or intermediate scrutiny, or that satisfaction of intermediate scrutiny does not require the factual presentation demanded by the court of appeals, the Solomon Amendment will be sustained, and no further proceedings will be necessary.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

APRIL 2005

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No. 04-1152

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *ET AL.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN LEGION IN SUPPORT OF PETITIONERS

PHILIP B. ONDERDONK, JR.
National Judge Advocate
THE AMERICAN LEGION
P.O. Box 1055
Indianapolis, IN 46206

ROBERT P. PARKER
Counsel of Record
ANDREW J. PUGLIA LEVY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1615 L Street, N.W.
Washington, D.C. 20036
(202) 223-7300

Counsel for Amicus Curiae

July 15, 2005

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BRIEF *AMICUS CURIAE* OF THE AMERICAN LEGION

Pursuant to Rule 47.3, *amicus curiae* The American Legion respectfully submits this brief in support of petitioners and asks that the judgment below be reversed.[1]

INTEREST OF *AMICUS*

The American Legion ("the Legion") is the largest veterans organization in the United States, comprising more than 2,600,000 current and former members of our Armed Forces. Congress chartered the Legion as a corporation in 1919. *See* Act of September 16, 1919 ch. 59, 41 Stat. 284 (currently codified at 36 U.S.C. §§ 21701-08 (2005)). The Legion's statutory purposes include upholding and defending the Constitution of the United States and supporting its members' service to their country. *See* 36 U.S.C. § 21702. Towards these ends, the Legion long has worked to foster patriotism, character and good citizenship—as well as the military ideal of the citizen-soldier.

The Legion's commitment to collective responsibility and a military composed, in part, of citizen-soldiers is reflected in the Preamble to its Constitution: The Legion seeks to "inculcate a sense of individual obligation to the community, state and nation; [and to] combat the autocracy of both the classes and the masses." Preamble, The American Legion Const.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus* has received consent to file this brief from counsel for petitioners and respondents. The letters evidencing such consent have been filed with the Clerk of Court. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

There is no test for Legion membership except for honorable military service in the United States Armed Forces during a period of hostilities. *See* 36 U.S.C. § 21703.[2] Nor does the Legion poll its members as to their personal beliefs. In all likelihood, the Legion's more than 2.6 million members have widely divergent views on government policies, including the so-called "Don't Ask, Don't Tell" law regarding homosexuals in the military. *See* 10 U.S.C. § 654 (1993). Indeed, the Legion has at least one Post comprising almost exclusively homosexual veterans—the Alexander Hamilton Post in San Francisco, California.

However, this case is not about "Don't Ask, Don't Tell," or any other law or military policy. At issue is the constitutionality of the Solomon Amendment. That is, does Congress have the discretion to withhold certain federal funds (*i.e.*, taxpayer dollars) from those institutions of higher learning that, for any reason, choose to interfere with the military's ability to carry out the government's most crucial constitutional duty—namely, to provide for the national defense of the United States.

SUMMARY OF ARGUMENT

Recruiting is the lifeblood of our modern, all-volunteer military. For the more than 30 years since Congress abolished the draft, the military has relied on recruitment directly from our nation's colleges and universities to sustain the strength and excellence of our Armed Forces across various disciplines. Along with the military academies, colleges and universities—through the Reserve Officers Training Corps ("ROTC") and on-campus

[2] An individual also is eligible for membership if the individual has served honorably in the Armed Forces of "a government associated with the United States during a period [of hostilities] and was a citizen of the United States when the individual entered that service." *See* 36 U.S.C. § 21703(1)(B).

recruiting from graduate and undergraduate programs—are the primary source of active-duty and reserve officers.

The Solomon Amendment was enacted in furtherance of Congress' compelling interest in promoting effective military recruiting as a fundamental component of our national security. Denying military recruiters equal access to the men and women of our institutions of higher learning would impede the military's ability to ensure an officer corps, including judge advocates, not only of sufficient size, but of quality and diversity as well. Indeed, the officers recruited from colleges and universities serve an important purpose beyond mere manpower: By virtue of having been educated in civilian institutions, these officers bring a perspective and values to military service that complement, and counterbalance, the worldview brought to the service by professional officers graduated from the academies. This need is especially acute in the Judge Advocate General's Corps (the "JAG Corps"), which implements a system of military justice in accordance with the Uniform Code of Military Justice and advises military and civilian leaders on a wide range of legal matters, including the laws of engagement, international law, and, recently, the handling of detainees in the War on Terror.

The Third Circuit's conclusion that Congress could serve this compelling interest through more narrowly tailored means, such as television and radio advertisements, *see Forum for Academic and Institutional Rights (F.A.I.R.)* v. *Rumsfeld*, 390 F.3d 219, 234-35 (3d Cir. 2004), is unrealistic; the fact that the private sector relies so heavily on on-campus recruitment demonstrates the wisdom of Congress' conclusion that there simply are no adequate substitutes for individualized, face-to-face interactions between the men and women of the military and interested students. At the same time, institutions and the students who attend them may exercise their First Amendment rights

by parading, picketing and protesting against any government policy they find objectionable.

Importantly, the Third Circuit's reasoning, if adopted, would impose significant barriers to military recruitment extending far beyond law school campuses and the specific objection to alleged discrimination involved in this case. But for the Solomon Amendment, medical, nursing and engineering schools, for example, as well as undergraduate liberal arts institutions, would be free to halt military recruiters at their gates, leaving the military without any recourse. High school recruiting would be in danger, too, as the law governing military access to high schools is substantially similar to the Solomon Amendment. And under the regime urged by respondents and endorsed by the Third Circuit, schools would be able to prohibit military recruiting based on nothing more than an objection to a particular law or military policy, or even a mere whim, and yet continue to receive taxpayer funding. Merely by providing equal access to military recruiters, however, educational institutions can avoid the Solomon Amendment's consequences *and* freely object to that with which they disagree.

The Solomon Amendment thus is an appropriate exercise of the Constitutional powers granted Congress with respect to the military, and deserves the deference this Court traditionally affords to Congressional judgments in matters of military affairs and national security. To conclude otherwise would subjugate the military's ability to function effectively—and thus to provide for the national security of the United States—to the caprice of our country's colleges and universities.

ARGUMENT

I. THE COURT SHOULD DEFER TO CONGRESS' UNIQUE CONSTITUTIONAL AUTHORITY OVER MILITARY AFFAIRS AND NATIONAL SECURITY.

Article 1 of the United States Constitution grants Congress broad powers over military affairs and national security. The Constitution bestows on Congress the "Power To . . . provide for the common Defense and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Congress also is authorized "[t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11; "[t]o raise and support Armies," *id.* cl. 12; "[t]o provide and maintain a Navy," *id.* cl. 13; "[t]o make Rules for the Government and Regulation of land and naval Forces," *id.* cl. 14; and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," *id.* cl. 18.

This Court has acknowledged the breadth of Congress' constitutional authority in these areas. *See, e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981) ("This Court has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies.") (citing *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975)); ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.") (citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)). Moreover, the Court has explained that it must tread carefully on matters involving the military and national security, both because the judiciary is insulated from political review, *see Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) ("It would be difficult to think of a clearer example of the type of governmental action that was

intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process."), and because it lacks the necessary expertise, *see id.* ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.") (quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953)) (emphasis in original).[3]

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[3] As Alexander Hamilton explained in support of broad legislative authority over military affairs:

> The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under direction of the same councils which are appointed to preside over the common defense.
>
> This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal. The Means ought to be proportionate to the End; the persons from whose agency the attainment of any End is expected, ought to possess the Means by which it is to be attained.

THE FEDERALIST No. 23, 146-51 (Alexander Hamilton) (Penguin Classics, ed. 1987) (discussing art. I, § 8, cl. 12). Hamilton also observed that: "The idea of restraining the Legislative authority, in the means of providing for the national defense, is one of those refinements, which owe their origin to a zeal for liberty more ardent than enlightened." *Id.*, No. 26, 164-71.

Recognizing Congress' constitutional mandate and the shortcomings of extensive judicial involvement, the Court consistently has deferred to Congress' judgments regarding military affairs. *See Soloario* v. *United States*, 483 U.S. 435, 447 (1987) (stating that "judicial deference . . . is at its apogee" when Congress' authority to govern military affairs is challenged) (quoting *Rostker*, 453 U.S. at 70); *Orloff*, 345 U.S. at 93-94 ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); *see also Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986) (stating that the courts "must give great deference to the professional judgment of military authorities concerning the relative importance of a particularly military interest"). This Court, of course, remains the final arbiter of constitutional questions; however, "the tests and limitations to be applied may differ because of the military context." *Rostker*, 453 U.S. at 67

The law at issue in this case represents the collective judgment of Congress on the issues of military personnel and national security, matters uniquely within Congress' constitutional purview. The Solomon Amendment provides that the funds of certain federal agencies may be withheld from institutions of higher education that deny military recruiters access to their campuses and students equal to that which they provide other employers. *See* 10 U.S.C. 983(b)(1).[4] Representative Solomon explained the rationale behind the law during a floor debate, stating that:

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[4] The law does not allow the withholding of "any Federal grant of funds to an institution of higher education . . . available solely for student financial assistance or related administrative costs." Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, § 8120, 113 Stat. 1212 (1999).

> [R]ecruiting is the key to our all-volunteer military forces, which have been such a spectacular success. Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and colleges and informing young people of the increasing opportunities that a military tour or career can provide. That is why we need this amendment.

142 Cong. Rec. H7335 (daily ed. July 11, 1996) (statement of Rep. Solomon); *see also* 141 Cong. Rec. E13-01 (daily ed. Jan. 4, 1995) (statement of Rep. Solomon) ("Barring military recruiters is an intrusion on Federal prerogatives . . . and an impediment to sound national security policy."); 142 Cong. Rec. H5715 (daily ed. May 30, 1996) (statement of Rep. Goodlatte) ("Campus recruiting is a vitally important component of the military's effort to attract our Nation's

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Earlier versions of the Solomon Amendment did not have a reference to "equal access." *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663 (1994) (denying federal funds to institutions of higher learning that "has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campuses or access to students on campuses."). However, Congress determined that equal access was an important and necessary component of recruitment and amended the Solomon Amendment in 2004. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811 (2004). As currently amended, the Solomon Amendment does not mandate access, or demand a specified level of access; rather, the law conditions federal funds on equal access to an "institution of higher education" or a "subelement" of such an institution, if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1).

best and brightest young people," and institutions that exclude military recruiters "interfere with the Federal Government's constitutionally mandated function of raising a military").

Congress' judgment in this case is entitled to no less deference because it pertains to recruitment. In *Rostker* v. *Goldberg*, a class of males argued that the Military Selective Service Act ("MSSA") violated the Fifth Amendment's due process clause by authorizing the President to require the registration of males but not females. *See* 453 U.S. at 63 & n.4. In upholding the law, the Court rejected the notion that a lesser amount of deference was due Congress' judgment in enacting the MSSA because the law was not concerned with day-to-day military operations. *Id.* at 68. It also rejected the suggestion that the MSSA "involves civilians, not the military," and that "the impact of registration on the military is only indirect and attenuated." *Id.* In a statement equally applicable to on-campus recruiting, the Court explained that, "these efforts to divorce registration from the military and national defense context, with all the deference called for in that context, [are] singularly unpersuasive." *Id.* (citing and quoting *O'Brien*, 391 U.S. 367). Moreover, "[r]egistration is not an end in itself in the civilian world but rather the first step in the induction process into the military one." *Id.* The same is true of on-campus recruiting. Like registration, it is a critical early step in the induction of men and women into our modern, all-volunteer military. In light of this fact, "[i]t would be blinking reality to say that [the Court's] precedents requiring deference to Congress in military affairs are not implicated by the present case." *Id.* at 68-69.

Nor does the Court necessarily view the presence of an asserted competing constitutional interest as a bar to Congressional action in the military sphere. *See, e.g.*, *Goldman*, 475 U.S. 504 (upholding uniform regulations to freedom of religion challenge); *Rostker*, 453 U.S. 57

(upholding conscription law that discriminated on the basis of sex); *Brown* v. *Glines*, 444 U.S. 348 (1980) (upholding regulations that imposed prior restraint on right to petition of military personnel); *Greer* v. *Spock*, 424 U.S. 828 (1976) (upholding law banning political speeches by civilians on military base); *Parker* v. *Levy*, 417 U.S. 733 (1974) (upholding provisions of Military Code of Criminal Justice that infringed on freedom of speech).

For practical and institutional reasons, the Court has turned a skeptical eye on challenges to laws that affect military affairs, including recruitment, even when other constitutional principles are invoked. A change of course in this case would be especially inappropriate because Congress is not directly regulating or infringing on law schools' First Amendment rights or academic freedom, but merely placing conditions on the conduct required to receive certain federal funds. Students and facilities remain free to protest recruiters or to take any other ameliorative steps to express their disagreement with a given law or military policy. As Judge Aldisert stated in his dissent from the Third Circuit's opinion, the cases involving civilian affairs relied on by the majority are simply not analogous to this case where "an act of Congress was not only authorized by various Clauses in Articles I and II, but commanded by them." *F.A.I.R.*, 390 F.3d at 250 (Aldisert, J., dissenting).[5]

[5] Moreover, although the Solomon Amendment has received significant recent attention, for almost forty years Congress has conditioned certain federal funds to institutions of higher education allowing military recruiters on their campuses. *See, e.g.*, Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972) (restricting distribution of Department of Defense funds to institutions of higher education that bar military recruiters from their campuses); Department of Defense Authorization Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905 (1970) (same); National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968) (restricting distribution of NASA funds).

II. THE GOVERNMENT HAS A COMPELLING INTEREST IN ENSURING THAT THE MILITARY CAN RECRUIT HIGHLY EDUCATED, CIVILIAN-TRAINED OFFICERS FROM DIVERSE BACKGROUNDS.

This Court has stated that "[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (internal quotations omitted). The Solomon Amendment directly furthers this interest.

The military's ability to recruit highly qualified officers, including judge advocates, from diverse backgrounds is inextricably bound with its ability to provide a strong, competent military, able to protect the national security of the United States. As the Court has recognized, "a military officer holds a particular position of responsibility and command in the Armed Forces." *Parker*, 417 U.S. at 744. "The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee[,] he is named to the specific rank during the pleasure of the President." *Id.* (quoting *Orloff*, 345 U.S. at 91). Effective officer recruiting depends on equal access to the men and women of our colleges and universities. *See* Decl. of Major Gen. Thomas J. Romig, U.S. Army ¶ 21, *F.A.I.R.* (03-4433) (hereinafter "Decl. of U.S. Army").

A. Civilian-trained Officers are Essential for a Well-rounded Military that Reflects and Protects the Country's Values.

Although this case arises in the context of JAG recruiting, the Solomon Amendment is critical to the officer corps generally: The law supports the ideal of a military of shared duty, reflective of our core values as a Nation and with the educational backgrounds necessary to address our modern national security challenges. These principles are consistent with the military's commitment to an officer corps that consists of both professional officers and those educated by our civilian institutions.

Indeed, the "citizen-soldiers" produced by our colleges and universities are necessary "to counterbalance . . . the professional officers coming out of the academies . . . [and] bring to military service a wider and more rounded background." MICHAEL S. NEIBERG, MAKING CITIZEN SOLDIERS: ROTC AND THE IDEOLOGY OF AMERICAN MILITARY SERVICE 2-3 (Harvard Univ. Press 2000); *see* Col. Charles J. Dunlap, Jr. *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 390 (1994) (recommending that to "broaden the[ir] outlook," military academy cadets and mid-level officers should spend at least one year at leading university); Beth Potier, *ROTC Commissioning Ceremony Stresses Importance of Scholars and Soldiers*, HARVARD UNIV. GAZETTE, June 8, 2005 ("The need for having a viable, national-level citizen-soldier commissioning program like ROTC is abundantly clear. . . . [T]he cadets and ensigns of ROTC [are] critical decision-makers who reflect the broad spectrum of America's colleges and universities."). Congress recognized the need for such a broad and diverse officer corps when it passed the Solomon Amendment. *See* 141 Cong. Rec. H5963 (daily ed. June 14, 1995) (statement

of Rep. Solomon) ("We depend on our all-volunteer military. We want that cross-section of America.").

Historically, institutions of higher learning themselves have recognized an interest in training officers and providing the skills necessary for a strong military. *See* Neiberg, *supra*, at 133 (quoting, for example, executive director of state college and university association, in 1970: "[T]he belie[f] that officers in the military should come from institutions all over the country, and that this diversity of background held to maintain a democratic leadership in the military . . . is a principle which we would not surrender lightly"). These institutions acknowledged that skilled officers were critical to our country's national defense but refused to cede their training exclusively to the military academies. *Id.* at 3. Instead, they concluded—at times in the face of intense pressure from students and professors—that maintaining their institutions' influence on the military outweighed any temporary objections to the military policy of the day. *Id.* at 103. Stated differently: Institutions of higher learning were concerned less with the military's presence on their campuses than with their students' presence in the military.

The civilian-military gap has widened at many colleges and universities since the time of the Vietnam War.[6] However, some modern-day academics continue to understand the value of training citizen-soldiers, including as a means to counter an objectionable law or policy. The co-chair of Columbia University's Task Force on ROTC, for

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[6] During World War I and World War II, graduates of Ivy League schools such as Harvard and Yale gave their lives in "disproportionate numbers"; this year, by contrast, Princeton's graduating class of 1,175 student included only 8 who chose careers in the military. *See* T. Trent Gegax & Evan Thomas, *The Family Business*, Newsweek, at 24 (June 20, 2005).

example, said in support of an ultimately unsuccessful resolution to reestablish the ROTC on campus that: "[T]he most powerful agent of change we can provide is Columbia-educated leaders for the military. . . . You cannot effect change without engaging an issue. Universities are vital when they educate and irrelevant when they boycott." *Final Report of the ROTC Task Force, The Case for ROTC at Columbia* (statement by James H. Applegate), at *15-16 (May 6, 2005), *at* http://www.columbia.edu/cu/senate/committees/rotc/0505rotcreport.htm.

The military's need for highly educated officers with varied perspectives is especially pronounced as it engages in the fight against terrorism and employs increasingly complex strategies and technologies. *See Hearing Before the Subcomm. on Military Readiness of the House Armed Services Comm.*, 107th Cong. (2002) (statement of Gen. Donald G. Cook, Commander, Air Education and Training Command, U.S. Air Force) ("Education requirements have grown in recent years due to the . . . increased need for specialized education and training in today's dynamic combat environment."). In the War on Terror, the enemies we face are often asymmetrical in capabilities and non-traditional in tactics. Creative, progressive thinking therefore is crucial as we conceive future military strategies. *See generally* THOMAS P.M. BARNETT, THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY 9-59, 89-96 (Putnam 2003) (explaining need for new operating theory for national security and military operations in post-Cold War environment and describing rise of asymmetrical threats); *see also* Beth Asch & James R. Hosek, *Looking to the Future: What Does Transformation Mean for Military Manpower and Personnel Policy?*, at 2 (RAND Corp. 2004) (quoting Sec. of Defense Donald Rumsfeld: "Transformation must encourage a culture of creativity and intelligent risk taking

and promote a more entrepreneurial approach to developing military capabilities.") (internal quotations omitted). Officers not steeped in the pre-9/11 military doctrines of the academies are an important part of this effort.

Furthermore, modern-day officers need to be well educated in the history, culture, politics and sensibilities of the world's diverse populations to effectively represent our country abroad. Recognizing this, the military is "more aggressively pursuing leaders' education now than during any other period of conflict in our history. In addition to preparing leaders for specific billets, [the military is] educating them to promote intellectual pluralism, increase their cultural awareness, and to encourage a 'lifetime of learning'." *See Hearing Before Senate Comm. on Armed Services To Receive Testimony on the Status of the U.S. Army and U.S. Marine Corps in Fighting the Global War on Terrorism*, 109th Cong. 5 (2005) (statement of Gen. Peter J. Schoomaker, Chief of Staff, U.S. Army). Because civilian-trained officers embrace "a value system . . . consistent with American society, by virtue of having lived in a civilian environment," Neiberg, *supra*, at 3, they help ensure that our military exports an accurate impression of America's values and ideals as our strategic engagements bring us in contact with other cultures and religious faiths.

Civilian-trained officers also increase the racial diversity of the military, something that this Court and the military have deemed to be of vital importance. Just last Term, in *Grutter* v. *Bollinger*, the Court cited an *amici curiae* brief submitted by "high-ranking retired officers and civilian leaders of the United States military" in support of the Court's conclusion that law schools have a compelling interest in a diverse student body. 539 U.S. 306, 331 (2004). The Court explained that: "Based on [their] decades of experience, a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill

its principle mission to provide national security." *Id.* (internal quotations and citation omitted).

B. Lack of On-campus Military Recruiting Would Significantly Hinder the Military's Ability to Recruit Sufficient Officers—both Quantitatively and Qualitatively.

Even under the best of conditions, military recruiters must overcome several obstacles in convincing students to forego careers in the private sector in favor of joining the military. In the case of law students, many law firms and other private employers hire recent law graduates at considerably higher salaries for jobs that demand significantly less personal sacrifice. The military, by contrast, cannot negotiate salaries and has limited ability even to negotiate where a student will be stationed. *See* Decl. of Rear Admiral Jeffrey L. Fowler, U.S. Navy ¶ 6, *F.A.I.R.* (03-4433) (hereinafter "Decl. of U.S. Navy").

But the current conditions are far from ideal. Military recruiters presently face the most challenging recruiting environment in the history of our all-volunteer military. *See* Major Gen. Michael D. Rochelle, *Remarks at Army Recruiting Commander Briefing* (May 20, 2005), *available at* http:// www.defenselink.mil/transcripts/2005/tr20050520-2881.html. Unemployment is at sustained historic lows. And with the soldiers, Marines, sailors, Coast Guardsmen and airmen of our Armed Forces engaged in extended combat in Afghanistan, Iraq and elsewhere, the demand for new recruits is severe. *See, e.g.*, Robert Burns, *Army Headed to Recruiting Shortfall*, ASSOC. PRESS, June 8, 2005 (stating that Army likely will fall short of its full-year recruiting goal for first time since 1999). The Solomon Amendment encourages institutions that benefit from taxpayer funds to give the military a fair chance to identify officer candidates.

Although most law schools currently comply with the Solomon Amendment rather than forgo federal funds, many would stop granting access to military recruiters if the Solomon Amendment was struck down. The bylaws of the Association of American Law Schools ("AALS"), to which 166 of the 189 law schools accredited by the American Bar Association belong, require member law schools to exclude from recruiting on their campuses any employer that discriminates in hiring based on, among other things, sexual orientation. *See* Bylaws of the AALS, art. VI, § 6-3(b), *at* http://aals.org/bylaws.html. Given the potential financial impact on schools that do not comply with the Solomon Amendment, the AALS has amended its nondiscrimination policy to provide an exception for military recruiting. *See* AALS Exec. Dir. Carl Monk, *Memorandum to Deans of Member Schools* (January 24, 2000), *at* http://aals.org/00-2.html. However, but for the Solomon Amendment, nearly 88 percent of the nation's ABA-accredited law schools would follow the AALS bylaws and ban the military from recruiting on their campuses without any federal consequences.

This would cripple the military as it attempts to maintain a well-rounded JAG Corps that is filled with the most talented and diverse law students available. *See* Decl. of U.S. Army ¶ 10 (stating that sixty percent of all new judge advocates are recruited from civilian ranks). As discussed below, the role of the JAG Corps in the military—and our society—it too important to be so hindered. *Cf. Hamilton* v. *Regents of the Univ. of Cal.*, 293 U.S. 245, 263 (1934) ("Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government.").[7]

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[7] At least one circuit court has indicated that individual students are without recourse as well. In *Nomi* v. *The Regents for the University of*

C. JAG Officers Play an Indispensable Role in an Increasingly Complex Military.

The complexity, breadth and importance of the issues that judge advocates participate in require the best and brightest attorneys available. Judge advocates are deployed throughout the world, providing direct advice and assistance on a daily basis to combatant commanders on issues such as military justice, the rules of engagement, target lists, the establishment of war crime tribunals, international treaties and the law of armed conflict. *See* Decl. of U.S. Navy ¶ 1, at 2; Decl. of Brigadier Gen. Walter E. Gaskin, U.S. Marines ¶ 1, at 2, *F.A.I.R.* (03-4433) (hereinafter "Decl. of U.S. Marines"). Judge advocates also are involved in non-combat operations, including humanitarian and disaster relief missions. Decl. of U.S. Army ¶ 5. And, as explained more thoroughly in the *amicus curiae* brief submitted by the Judge Advocates Association, judge advocates in all branches of the Armed Services are providing critical support in the War on Terror. *See generally* Brief for Judge Advocates Association as *Amicus Curiae* at 8-11. From offensive operations against suspect terrorists to civil rebuilding projects, judge advocates are supporting their commanders and fellow soldiers.

Judge advocates also administer a system of military justice intended to field a disciplined, effective military

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Minnesota, 5 F.3d 332 (8th Cir. 1993), the Eighth Circuit dismissed a law student's challenge to the University of Minnesota Law School's policy of prohibiting the military from recruiting on campus. The student, who wished to meet with military recruiters, argued that the school's policy violated his First Amendment rights. The court concluded that because the student had graduated by the time of his appeal, the case was moot. Given the time it takes for a case to work its way through the judicial system, other students likely would face a bar to full adjudication of similar constitutional claims.

force and ensure that the rights of all military personnel are safeguarded. *See* Decl. of U.S. Army ¶ 6. This role of the military lawyer as protector and enforcer of military law is crucial considering the closed nature of military society, *see Parker*, 417 U.S. at 743 ("[T]he military is, by necessity, a specialized society separate from civilian society."), and the unique laws that govern it, *id.* ("[M]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.") (quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953)); *see also Dynes* v. *Hoover*, 61 U.S. 65, 79 (1857) (explaining that Congress may provide for trial and punishment of military and naval offenses in manner practiced by civilized nations, and such power has no connection with judicial power defined by third article of the Constitution).[8]

The functioning of the military justice system is vital not only to the everyday operations of our Armed Forces, but also to the image and perception of the United States abroad. Indeed:

> The ability to fairly and equitably address misconduct and simultaneously deter others from wrongdoing ultimately bolsters the operational effectiveness of our military by maintaining the trust between service members, host nations, and the American people, thereby strengthening the national security interests of the United States.

Decl. of Major Gen. Jack L. Rives, U.S. Air Force ¶ 5, *F.A.I.R.* (03-4433) (hereinafter "Decl. of U.S. Air Force"). JAGs have been called on in this capacity recently in several

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[8] Further, "[a]n Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right of command in the officer, or the duty of obedience in the soldier." *United States* v. *Grimley*, 137 U.S. 147, 153 (1890).

high-profile matters, including the courts martial of those involved with the publicized incidents at Abu Ghraib and charged with misconduct on the battlefield of Iraq. Regardless of the outcome of these cases, the proper functioning of the military justice process bolsters the credibility of the military and emphasizes our country's commitment to the Rule of Law.

Military lawyers' understanding of military justice also occasionally serves to counterbalance the members of the military's civilian leadership and to restrain military policy, especially in wartime. As Major General Jack L. Rives, U.S. Air Force, has explained:

> It's especially important in the deployment environment for judge advocates to balance their 'can do' approach to mission accomplishment with the need to say 'no' when 'no' is the right answer. Deployed commanders often have a heightened sense of mission and of the need to accomplish important matters 'sooner than later.' But sometimes, the law will not permit commanders to do what they want to do, when they want to do it. . . . The JAG must explain the rules, provide the right advice always, and preclude problems by telling commanders what they need to know—even when it's difficult.

Maj. Gen. Jack Rives, *Expeditionary Law: Remarks on How to Succeed in the Deployed Environment*, 51 A.F.L. REV. 345, 349 (2001).

For example, citing the Constitution, federal law, the Geneva Conventions and the Uniform Code of Military Justice, JAG officers representing certain detainees at Guantanamo Bay, Cuba recently challenged the legal

authority of the government to try the detainees by military tribunal. *See, e.g.*, Anne Gearan, *Detainees' Lawyers Challenge Supreme Court*, ASSOC. PRESS, Jan. 14, 2004 (describing military lawyers' urging for access to civilian review as between that of government and detainee activists); *see also* Pamela Hess, *Military Lawyers Criticize Tribunal*, UNITED PRESS INT'L, Jan. 15, 2004 (describing military lawyers' actions as "watershed" event for America's military legal community).

JAG officers also have been front and center on the controversy over the treatment of detainees at Guantanamo Bay, Cuba. A JAG officer assigned to a war crimes task force drafted a memo objecting to certain aggressive interrogation policies allegedly urged, in part, by the military's civilian leaders. *See* James Gordon Meek, *At War with Gitmo Grilling*, N.Y. DAILY NEWS, Feb. 13, 2005; *cf.* Andrew Rosenthal, Editorial, *Legal Breach: The Government's Attorneys and Abu Ghraib*, N.Y. TIMES, Dec. 30, 2004 (quoting Jeh Johnson, former Secretary of Air Force: "Military lawyers . . . tend to see things through the prism of how it will affect their people if one gets captured or prosecuted"). And before the media was reporting the allegations at Abu Ghraib, a group of military lawyers, displeased with the decisions of their politically appointed supervisors on the issue of interrogations, met with the Association of the Bar of New York City. The group subsequently compiled a report that examined the government's policies and United States and international law governing the treatment of military prisoners. *See* Tom Regan, *Military Lawyers Advised Pentagon Two Years Ago to Protect Prisoners*, CHRISTIAN SCI. MONITOR, May 17, 2004.

Thus, JAGs act as a bridge between civilian and military institutions and as a check on overzealous policy. The ability of military lawyers to offer such balanced and

independent views, however, requires a JAG Corps with diverse perspectives and backgrounds and the capacity to effectively address both sides of difficult issues.

III. THE SOLOMON AMENDMENT IS NARROWLY TAILORED.

A. On-campus Recruiting is the Military's Most Effective Tool to Create a Strong, Diverse JAG Corps.

The Third Circuit purported to "balanc[e] the First Amendment interests implicated by the Solomon Amendment with competing societal interests to determine whether the statute transgresses constitutional boundaries." *F.A.I.R.*, 390 F.3d at 234. Although the court assumed the government's interest in "recruiting talented lawyers" is compelling, it concluded that the balance does not tip in the government's favor because "the means must be carefully tailored to achieve those ends." *Id.* According to the court, "[u]nlike a typical employer, the military has ample resources to recruit through alternative means," which "may be more costly" but are not necessarily less effective. *Id.* at 234-35.

The court's perspective is flawed. On-campus recruiting is the single most effective means for the military to make initial contact with a broad range of prospective applicants and to discuss the benefits of a career in the JAG Corps. *See* Decl. of U.S. Marines ¶ 6; Decl. of U.S. Navy ¶ 4. Without equal access to law schools, the potential applicant pool would be limited to those already familiar with, and interested in, military careers. Indeed, for students without a military background, the primary means of learning about a career in the JAG Corps are law school career services offices and on-campus contact with JAG Corps representatives. *See* Decl. of U.S. Army ¶ 7. For many students, this representative is the first judge advocate they will have ever met. *See* Dunlap, Jr., *The Erosion of Civilian Control of the U.S. Military*, *supra*, at 367 ("As military service becomes increasingly rare among the general population and as military education programs disappear from many college campuses, few opportunities allow for contact with anyone associated with the armed forces.").

Thus, access to law school campuses provides students with what is arguably the most important aspect of military recruiting—personal interaction with the men and women of the Armed Forces. *See* Decl. of U.S. Navy ¶ 4; Decl. of U.S. Marines ¶ 8. An Air Force survey indicated that "over 43% of the [Air Force] JAGs who have been selected from 2000 to 2004 stated that their face-to-face on-campus interview were critical in their decision to apply." Decl. of U.S. Air Force ¶ 19. This is not surprising. The position of respondents notwithstanding, uniformed servicemen and women are not widely regarded as "bigots." *See* Adam Liptak, *Colleges Can Bar Army Recruiters*, N.Y. TIMES, Nov. 30, 2004, at A1 (quoting counsel for F.A.I.R. in reference to Third Circuit's decision: "Enlightened institutions have a First Amendment right to exclude bigots"). Rather:

> [t]hroughout our history, especially in times of war, like the present conflicts in Afghanistan and Iraq, and the military campaign against the Al Qaeda, a completely different impression is invoked [by uniformed officers on campus]. The men and women in uniform are almost universally considered as heroes, sacrificing not only their lives and well-being but living separate from all the comforts of stateside living.

F.A.I.R., 390 F.3d at 251 (Aldisert, J., dissenting).[9] Exposure to those who have chosen a life of service and sacrifice is crucial to the military's ability to recruit like-minded individuals.

Furthermore, compared with private law firm jobs, the JAG Corps selection process is extremely complicated and protracted. *See* Decl. of U.S. Marines ¶¶ 3-4; U.S. Air Force ¶¶ 9-12 (describing many stages of recruitment and accession process). On-campus interviews provide recruiters the opportunity to demystify this process and provide answers to critical questions concerning the unique role of the JAG Corps and the many advantages associated with serving as a military attorney—including public service and greater exposure and legal experience than those in the private sector. *See* Decl. of U.S. Navy ¶ 7; Decl. of U.S. Air Force ¶ 17. These on-campus meetings can be especially enlightening because, in many cases, the recruiters are recent law school graduates who can relate to students and their various concerns and questions. *See* Decl. of U.S. Navy ¶ 7. Finally, as a practical matter, on-campus interviews are the easiest and most convenient for the students themselves, who are busy with classes and other school-related activities. The advantages of being present on campus—as opposed to requiring students to travel to a nearby hotel or recruiting office—are evidenced by the importance private employers place on the same access. *See* Decl. of U.S. Marines ¶ 6 ("Employers engage in on-campus recruiting primarily because it's easy for students.").

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[9] This Court has expressed similar sentiments: "Veterans have been obliged to drop their own affairs and take up the burdens of the nation . . . subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 550-51 (1983) (internal citations and quotations omitted).

Law schools clearly understand the benefits of on-campus contact with students, as well. Many of the nation's top law schools boast about the effectiveness and, thus, importance of their on-campus, law-firm recruiting programs. *See, e.g.*, Columbia Law School Career Services Website, *at* http://www.law.columbia.edu./careers/career_services/admitted (stating that Columbia organizes "one of the largest, most comprehensive on-campus recruiting in the country," and that "[m]ore than 70% of second-year students secure employment in the early fall through these [on-campus recruiting] programs."); Boston College Law School Fall Recruitment Guide, *at* http://www.bc.edu/schools/law/services/career/jobsearch/recruitguide (stating that "[a] significant percentage of the second and third-year students will accept positions as a result of fall recruiting" while others "will find their positions in the spring"); Stanford Law School Office of Career Services Website, *at* http://www.law.stanford.edu.admin.ocs/employers/recruiting (stating that "[t]he majority of our 2L and 3L students participate in, and find employment through," the fall campus interview program).

If the government is enjoined from enforcing the requirements of the Solomon Amendment, the JAG Corps' ability to meet its recruiting mission—*i.e.*, to attract and recruit a highly educated and diverse applicant pool, sufficient to meet current strength requirements—will be degraded, along with the military's ability to further the national security of the United States. *See* Decl. of U.S. Army ¶ 23; Decl. of U.S. Air Force ¶ 31.

B. The Alternatives Cited by the Third Circuit are Inadequate.

Among the alternatives to on-campus recruiting that the Third Circuit offered were student loan repayment programs and "sophisticated recruitment devices," such as television

and radio advertisements. *F.A.I.R.*, 390 F.3d at 234-35. Implicit in the court's statement is that the government, unlike private law firms, has unlimited resources to devote to recruiting for the Armed Services. This clearly is not the case. But even if it were, these alternatives are inadequate substitutes for on-campus recruiting.[10]

First, although the military is experimenting with supplemental recruiting approaches, including multi-media campaigns, *see* Cap. Eugene Y. Kim, *The Judge Advocate Recruiting Office: The Gateway to Service*, 2004-JUN ARMY LAW. 33, 38 (2004), these efforts cannot replace one-on-one interaction with law students. *See* Decl. of Dr. David S. Chu, Dep't of Def. ¶ 6, *F.A.I.R.* (03-4433) (hereinafter "Decl. of Dep't of Def."); Dec. of U.S. Air Force ¶ 32; Decl. of U.S. Navy ¶ 4. One of the rationales for law schools' extensive fall and spring recruiting campaigns is to provide students with a discrete period of time to concentrate primarily on employment matters. Some schools even schedule their fall recruiting programs before classes begin, so that students have no distractions. Radio and television advertisements or additional scholarships cannot replace this sort of devoted attention. *See* Decl. of U.S. Army ¶ 22; Decl. of U.S. Marine Corps. ¶ 8.

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[10] The court also stated that the "ill-will" generated toward the military as the result of the Solomon Amendment actually impedes military recruitment. 390 F.3d at 235. Given its position in this case, the military obviously disagrees. Furthermore, the court's argument just as logically cuts the other way—that is, the Solomon Amendment is critical to law schools' advocacy against "Don't Ask, Don't Tell." Without the Solomon Amendment, law schools would be free to ban military recruiters from their campuses. There would be no cause for student and faculty protests on campus; no moment for public statements to the media or elsewhere; and no need for prominent disclaimers of the allegedly discriminatory law. In other words, it is Congress' insistence on a military presence that has given rise to these activities, which, in turn, have effectively and publicly disseminated law schools' message.

Second, the government's financial resources are finite. The monies necessary to implement the "more costly" alternatives cited by the court are currently devoted to other areas. Even apart from recruiting, the growing demands of the war in Iraq and the global military environment, as well as the domestic budgetary process in general, are placing increasing constraints on the military's resources. *See* Decl. of Dep't of Def. ¶ 7. It is not clear which of the funds currently invested in the war on terror or supporting our soldiers, Marines, sailors, Coast Guardsmen and airmen the court suggests the military divert.

IV. THE THIRD CIRCUIT'S REASONING WOULD PERMIT ANY INSTITUTION TO DENY THEIR STUDENTS ACCESS TO MILITARY RECRUITERS ON THEIR CAMPUSES FOR ANY REASON.

Nothing in the Third Circuit's reasoning is limited to law schools, or the current controversy over alleged discrimination in military hiring. If adopted, the Solomon Amendment's application to other institutions of higher learning—including graduate medical, nursing, engineering schools, as well as undergraduate colleges and universities—would be in jeopardy. *See* 10 U.S.C. § 983(b)(1) (referring only to "an institution of higher education").

Many colleges and universities, for example, currently allow ROTC on campus only out of fear of losing federal funds through operation of the Solomon Amendment. *See, e.g.*, Ryan Foley, *UW-Stout Chancellor Reverses Decision on ROTC, Fearing Loss of Federal Funds*, DULUTH NEWS TRIB., June 1, 2005. And Columbia University is comfortable maintaining its ban on ROTC despite having "made the difficult decision" to allow military recruiters on campus only because "[t]here has not yet been an attempt to

enforce the . . . ROTC-related provisions of the Solomon Amendment." *Final Report of ROTC Task Force*, *supra*, at *11.

High school military recruiting also could be affected. Although the Solomon Amendment does not regulate military recruiting at high schools, a separate law, the so-called Hutchinson Amendment, requires substantially similar access and thus is vulnerable to the same arguments levied by the law schools in this case. *See* 10 U.S.C. § 503(c) (2004);[11] *see also* Caroline Hendrie, *High Court Orders New Review of Michigan Title IX Case*, EDUC. WK. 28, 2005 WLNR 7939974, May 11, 2005 (quoting general counsel for National School Boards Association: "I see implications for No Child Left Behind, because they really are parallel requirements").

Notably, the Third Circuit's reasoning would permit these institutions to ban military recruiters from their campuses for any reason at all. The Third Circuit stated that "the District Court's scrutiny of the law schools' belief that the presence of military recruiters will undermine their expressive message about fairness and social justice violates the [*Boy Scouts of America* v.] *Dale* Court's instruction to 'give deference to an association's view of what would impair its expression.'" *F.A.I.R.*, 390 F.3d at 233. According to the court, "the reason why there was 'no question' . . . that a gay scoutmaster would undermine the Boy Scouts' message was because the Boy Scouts *said it would*." *Id.* (emphasis in original). Under this amorphous

[11] Section 503(c)(1)(A) provides the following with respect to access to secondary schools: "Each local educational agency receiving assistance under the Elementary and Secondary Education Act of 1965 . . . shall provide to military recruiters the same access to secondary school students as is provided generally to postsecondary educational institutions or to prospective employers of those students."

and entirely subjective standard, a college or university would be justified in banning military recruiters from its campus based on any objection to a given law or military policy—from a disfavored military operation abroad,[12] to base-closings, to any other of the military's recruitment standards, such as age and physical fitness.

This would, in essence, permit institutions of higher learning to allow the military to function on their campuses only when and if they see fit. Such arbitrary interferences with the military and national security—especially where those who wish to protest have numerous effective outlets for their views—are not imagined under the Constitution. They should not be required under the Constitution either.

[12] At least one high school has voted to prohibit military recruiting because of disagreement with the military's operations in Iraq. *See* Dean Paton, *Rift Over Recruiting at Public High Schools*, CHRISTIAN SCI. MONITOR, May 18, 2005.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

PHILIP B. ONDERDONK, JR.
National Judge Advocate
THE AMERICAN LEGION
P.O. Box 1055
Indianapolis, IN 46206

ROBERT P. PARKER
Counsel of Record
ANDREW J. PUGLIA LEVY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1615 L Street, N.W.
Washington, D.C. 20036
(202) 223-7300

Counsel for Amicus Curiae*

July 15, 2005

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(15)

No. 04-1152

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *ET AL.*,
Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC., *ET AL.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

ANDREW L. SCHLAFLY
939 Old Chester Road
Far Hills, NJ 07931
(908) 719-8608

July 15, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. § 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students provided to other employers. The question presented is whether the Court of Appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF has long advocated judicial restraint and separation of powers. In particular, Eagle

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

Forum ELDF has a strong interest in defending the power of Congress to attach conditions on spending in order to advance the will of the American people.

SUMMARY OF ARGUMENT

In striking down the Solomon Amendment, the Court of Appeals for the Third Circuit held that institutions may ban the hands that feed them. The court below held that the Solomon Amendment interfered with respondent academic institutions' rights of expressive association and compelled them to express views with which they disagreed. The lower court issued this dramatic ruling despite the fact that the imposition of these requirements was the result of voluntary conduct by the schools: their acceptance of grants or contracts issued by the federal government. The sweeping ruling below is wholly unsupported and adversely affects congressional power and national security.

Like many other provisions of federal law that place conditions on the expenditure of federal funds, the Solomon Amendment prohibits the Department of Defense from providing "by contract or by grant" funds to an institution of higher education if the Secretary of Defense determines that the institution has a "policy or practice" that "either prohibits, or in effect prevents" equal access to campuses or students for the purpose of military recruiting. 10 U.S.C. § 983(b)(1). The Amendment thereby reflects a long-established national policy of ensuring that the military will have continued access to potential recruits at our Nation's universities and institutions of higher education. A more compelling national interest is difficult to imagine.

Numerous precedents of this Court recognize and uphold the power of Congress to place conditions on the receipt of money that it raises and spends. The Court of Appeals' ruling contradicts these rulings and virtually compels Congress to spend money in a manner contrary to the will of

the American people. Nothing in the Constitution mandates this result. Institutions are fully entitled to decline federal grants and subsidies, as some have in the past in other contexts. But once an institution accepts federal subsidies then it hardly violates its constitutional rights to allow access by the same entity that funds the institution: the federal government. Throughout all this, the recipient of the funding remains free to openly disagree with the military and its policies — and, as the record demonstrates, routinely do so.

It is inconsistent with separation of powers for the judiciary to dictate to Congress how it may and may not spend money. The Spending Clause of the Constitution, U.S. Const. Art. I, § 8, cl. 1, confers on Congress the full and exclusive authority over the spending of federal money. Congress can single out institutions for funding, or defunding, without being second-guessed by the judiciary. For example, it is for Congress, not the judiciary, to decide what kind of art to fund. It is for Congress, not the judiciary, to decide what kind of research to finance. Likewise, it is for Congress, not the judiciary, to decide what type of institution to support with subsidies. It is not an abuse of its spending power for Congress to limit funding to institutions that allow access by government representatives for military recruitment.

The Court of Appeals makes much of the universities' rights to "expressive association," but it has no expressive right to exclude its government patrons. What is at issue here is conduct, not speech, as the respondent institutions insist on first taking money, and then blocking access by the provider of the money. Moreover, even if there were an expressive right here, the compelling interest of national security underlying the Solomon Amendment trumps such right. The Court of Appeals' ruling will significantly impair our national security in a time of war, as voluntary military recruitment is essential to the continued viability of our military forces.

The potential effects of the Court of Appeals' ruling outside the present context are likewise troubling. The lower court has essentially granted government contractors and grantees a constitutional right to unilaterally and retroactively abrogate agreements into which they entered voluntarily. Universities and other recipients of federal contracts and grants routinely enter into agreements with the government that impose a variety of requirements, many of which might be said to implicate First Amendment or other constitutional rights. Yet the Court of Appeals' ruling would allow government contractors and grantees to impose a one-sided bargain that was never contemplated by the parties. Recipients of federal funding could enter into contracts with the government knowing full well that the government has implemented policies with which they disagree and attached conditions that they do not intend to honor, remaining silent until they later assert that these voluntary agreements somehow "infringe" their constitutional rights and seek to unilaterally and retroactively impose terms that are more to their liking. There is no such constitutional right to abrogate or rewrite agreements that were entirely voluntary.

ARGUMENT

I. CONGRESS MAY CHOOSE NOT TO FUND INSTITUTIONS THAT DISCRIMINATE AGAINST MILITARY RECRUITERS.

Congress can constitutionally fund some activities but not others. "The government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). This is not viewpoint discrimination. Government "has merely chosen to fund one activity to the exclusion of the other." *Id.* Congress, by choosing where it

allocates its funding, has neither discriminated nor infringed upon the rights and freedoms of Americans.

Congress need not dole out billions of dollars annually to institutions that discriminate against and exclude military recruiters. Under the Spending Clause, Congress has full and unfettered power to decide how to allocate monies raised by the federal government. U.S. Const. Art. I, § 8, cl. 1. Congress could do so as part of its budgetary process each year, expressly identifying which institutions will and will not receive funding for a particular fiscal year. Alternatively, Congress could accomplish the same end more efficiently by attaching conditions to its funding. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987) ("The Constitution empowers Congress to 'lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.' Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.") (quotations omitted).

Accordingly, Congress can choose to spend money on institutions that allow military recruitment, while refraining from spending money on those that exclude such recruitment. The courts should no more compel Congress to fund a particular or type of institution than should the courts interfere with congressional control over taxation. Justice Kennedy, in a concurrence joined by Justices Rehnquist, O'Connor and Scalia, warned against embracing "an expansion of power in the federal judiciary ... [that] disregards fundamental precepts for the democratic control of public institutions." *Missouri v. Jenkins*, 495 U.S. 33, 58-59 (1990) (Kennedy, J., concurring).

A congressional refusal to fund a specific activity is fully constitutional, and is not to be condemned as a penalty on alternate activities. *See Harris v. McRae*, 448 U.S. 297 (1980) ("A refusal to fund protected activity, without more,

cannot be equated with the imposition of a 'penalty' on that activity."); *John Glenn Presidential Committee, Inc. v. Federal Election Com.*, 822 F.2d 1097, 1100 (D.C. Cir. 1987) ("A legislature's decision not to subsidize the exercise of a fundamental right — a fortiori, a decision to place dollar limits on public subsidies — does not infringe that right."). The government, whether as speaker or as policymaker, may selectively fund programs considered to be in the interest of its citizenry, without any obligation to fund or even encourage alternatives.

It is axiomatic that the government's "decision not to subsidize the exercise of a fundamental right does not infringe on that right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983). "These are scarcely novel principles. We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* A long line of precedents of this Court illustrates that the legislature's choice of funding does not constitute an unconstitutional discrimination or infringement of rights in programs denied subsidization. As in *Rust* and in the more recent case of internet filtering in public libraries, "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *United States v. Am. Library Ass'n*, 539 U.S. 194, 211 (2003).

The congressional decision not to fund universities that discriminate against military recruiters cannot be described as "viewpoint-based" discrimination. The prohibiting of military recruiting is conduct, not merely speech. As this Court made clear with respect to the burning of draft cards, conduct is not entitled to the protections of free speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea."). Where, as here, the government subsidy is not based

on an unconstitutional viewpoint requirement, Congress may support some universities but not others. "When the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). *See also L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 43 (1999) (Ginsburg, J., concurring) ("But if the award of the subsidy is not based on an illegitimate criterion such as viewpoint, California is free to support some speech without supporting other speech.").

As Justice Souter wrote in dissent in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, if "public university's funding determinations ... are made on the basis of a reasonable subject-matter distinction, but not on a viewpoint distinction, there is no violation." 515 U.S. 819, 893 n.12 (1995) (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993), quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)). Congress has made a similar, and equally constitutional, distinction in deciding which institutions to fund. The court below erred in applying the exacting standard of strict scrutiny to the congressional funding requirement of equal access for military recruiters, as embodied in the Solomon Amendment. *FAIR v. Rumsfeld*, 390 F.3d 219, 235 (2004).

"The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that — unlike direct restriction or prohibition — such a denial does not, as a general rule, have any significant coercive effect." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 590 (1998) (Scalia, J., concurring) (inner quotations omitted). The decision below should be reversed.

II. THE COURT BELOW VIOLATED SEPARATION OF POWERS BY ORDERING CONGRESS TO FUND AN ACTIVITY.

Congress has wide latitude to set spending priorities. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). In broadly construing the Spending Clause, Justice Cardozo wrote in favor of great deference to Congress on spending issues:

> The discretion [over spending] is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.

Helvering v. Davis, 301 U.S. 619, 640-41 (1937) (quotations omitted).

The nature of the governmental interest here reinforces the need for deference to Congress under the separation of powers. The Constitution expressly confers authority over military matters to the Legislature and the Executive. Congress alone is authorized to "raise and support an Army" and "provide and maintain a Navy." U.S. CONST. Art. I, § 8, cl. 12-13. It is also charged with the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.* Art. I, § 8, cl. 11. The President of the United States is given the power to act as "Commander in Chief of the Army and Navy of the United States." *Id.* Art. II, § 3, cl. 1. The Judiciary, in contrast, is given no express role with respect to the military. Indeed, this Court has observed that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Accordingly, in "perhaps no other area has the

Court accorded Congress greater deference" than "in the context of [its] authority over national defense and military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

Here, the coordinate branches have provided a specific and defined remedy for a specific and defined problem — the military's lack of access to institutes of higher education for recruiting purposes and the concomitant impairment of our national security. Nor did they do so lightly. Before passing the Solomon Amendment, Congress commissioned a study that "found 140 institutions of higher education that, for some reason or another, whatever reason, have denied recruiters access to their campuses." 140 Cong. Rec. S8172 (July 1, 1994) (Sen. Nickles). Members of Congress concluded that the lack of access represented a significant threat to national security, observing that "recruiting is the key to our all-volunteer military forces," 142 Cong. Rec. 16,860 (1996) (Rep. Solomon), that "[c]ampus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people," *id.* at 12,712 (Rep. Goodlatte), and that the universities that were denying access to recruiters were significantly "interfer[ing] with the Federal Government's constitutionally mandated function of raising a military," 141 Cong. Rec. 595 (1995) (Rep. Solomon).

By mandating that Congress fund institutions that prohibit the military from gaining access to their campuses, the Court of Appeals interfered not only with the Executive's prerogative to conduct military affairs, but also with an established congressional policy sanctioning that particular exercise of Executive power. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), *Schlesinger v. Councilman*, 420 U.S. 738, 757-

758 (1975), *Chappell v. Wallace*, 462 U.S. 296 (1983)). "It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers." *Gilligan v. Morgan*, 413 U.S. at 10-11.

This Court put it best in *Rostker v. Goldberg*: "[Judicial] deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." 453 U.S. at 70. The judiciary should defer to Congress in this matter.

III. THE SOLOMON AMENDMENT DOES NOT VIOLATE ANY RIGHTS OF EXPRESSIVE ASSOCIATION.

The lower court merely assumed without any analysis that "educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." *FAIR v. Rumsfeld*, 390 F.3d 219, 231 (3d Cir. 2004) (quotations omitted). But Congress expressly recognizes an exception for bona fide institutional values.[2] Beyond that, the actual conduct of a university in taking federal subsidies is more meaningful than admitting recruiters on a basis equal to numerous other recruiters as mandated by law. When values truly conflict between a donor and a recipient, the recipient remains free to express its disapproval by declining the subsidy. In fact, secular

[2] An exception may be found in institutes of higher education that have a religious affiliation and are therefore created to promulgate an established set of religious values. Such institutions may indeed constitute "expressive associations." However, the Solomon Amendment recognizes this possibility and exempts institutions of higher education that have "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2).

universities and other academic institutions do not exist to sponsor a single ideology or viewpoint, but rather serve as fora for wide-ranging and open debate in which individuals having disparate viewpoints may all participate.

Even if there were a bona fide First Amendment right at stake here, recruitment to support our Nation's volunteer military services is a compelling need that justifies infringement on that right. Our Nation is at war, and in the past Congress has exercised its power to forcibly draft college students against their will. Given that authority, Congress surely possesses the far lesser power of supporting an all-volunteer military by forbidding discrimination against military recruiters by institutions that accept federal funding.

A. Military Recruiting at Universities Does Not Implicate "Expressive Association."

Military recruiting activities at institutions accepting federal subsidies do not implicate expressive rights of association outlined in *Boy Scouts of Am. v. Dale*. 530 U.S. 640, 653 (2000). The district court correctly concluded that recruiting activities did not implicate any expressive activity, but the Court of Appeals erred in making the opposite determination. The Court of Appeals was mistaken in finding a constitutional violation because "[m]ilitary recruiters visiting law school campuses undoubtedly speak to students about the benefits of a career in the military, and the Solomon Amendment requires law schools to accept this speech." *FAIR*, 390 F.3d at 237.

"[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 566-67 (1995). Here, those facts demonstrate that the recruiting activities at issue do not implicate any First Amendment concerns. The fact that universities have agreed to give military recruiters equal access to their facilities in

exchange for government funds cannot be construed as any "endorsement" of the military's views or policies. *See FAIR v. Rumsfeld*, 390 F.3d at 257 (Aldisert, J., dissenting). This is particularly true given that observers understand that "the economic consequences of the Solomon Amendment" provide an incentive to institutions of higher education to afford military recruiters access. *Id.* "In contrast to the scoutmaster in *Dale*, recruiters do not purport to speak 'for' — and cannot reasonably be understood to be speaking 'for' — the law schools that they are visiting." *Id.* at 260.

The Court's rulings under the religion clauses of the First Amendment are instructive here. The Court has consistently held that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). This is particularly true where the forum is open to a "broad class of nonreligious as well as religious speakers." *Id.* In *Widmar*, for example, the Court concluded that it was doubtful that anyone "could draw any reasonable inference of University support [for private religious speech] from the mere fact of [supplying] a campus meeting place" when a university made its facilities available for meetings of "over 100 recognized [private] student groups," thereby creating an open "public forum." *Id.* at 276-77. *See also Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 766 (1995) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."); *Board of Educ. of Westside Community Schools v. Mergens By and Through Mergens*, 496 U.S. 226, 231, 246-47, 250 (1990) (when school permitted "30 recognized [student] groups" to "meet after school hours on school premises" establishing a "limited open forum," students were "likely to understand that [the] school does not endorse ... student speech").

So, too, there would be no endorsement of military policies by allowing equal access to military recruiters.

Hundreds if not thousands of recruiters routinely participate in recruiting activities occurring on campuses, and the vast majority of these recruiters have nothing to do with the military. There is simply no basis to draw any conclusion that affording military recruiters "equal access" to campus constitutes any "endorsement" of their views. *See Widmar*, 454 U.S. at 274. Again, this is particularly true given that the respondents have "taken pains to disassociate" themselves from the military's policies and viewpoints. *See Rosenberger*, 515 U.S. at 841.

As the district court found, the fact that these law schools provide similar assistance to other recruiters dispels any notion that their conferring equal access to military recruiters constitutes any "endorsement" of the military's position. "[W]hen a law school does all these things for every other potential employer in the context of a large recruiting function," there is no "obvious endorsement[] of a particular ideological point of view." *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 310 (D.N.J. 2003).

More fundamentally, "the Solomon Amendment does not directly restrict speech, making this case factually different from prior cases applying the doctrine of unconstitutional conditions." *Id.* at 297. The Amendment does not, for example, "directly or entirely exclude a point of view." *Id.* at 300. The universities challenging the law, members of their faculty, employees, and students are all free to criticize the military or its policies, and indeed frequently do so. *See id.* at 302. They "are free to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters." *Id.* at 305. The law does not seek to suppress any speech that may be antagonistic to the government's policies. Rather, the statute merely guarantees that the military will have equal access to the institutions' facilities.

The First Amendment is implicated only where action is "sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409-10 (1974). As the district court found in the proceedings below, "if there is any expressive component to recruiting, it is entirely ancillary to its dominant economic purpose." *FAIR*, 291 F. Supp. 2d at 308. "Because there is little that is inherently expressive about the act of permitting military recruiters access to campus (or providing assistance to recruiters), the statute targets conduct, not speech." *Id.* at 311.

Similarly, the "assistance" that the law schools claim they are being compelled to give military recruiters does not implicate or interfere with expression. "[T]he law schools' actions in assisting military recruiters are insufficiently imbued with elements of communication to require the protection of the First Amendment." *Id.* at 309. In sum, "[t]he Solomon Amendment does not compel law schools to say anything." *Id.* In particular, there is no requirement that the law schools "endorse" any of the militaries policies; nor is there any "restriction on speech or conduct disclaiming any such endorsement." *Id.*

Finally, the Solomon Amendment does not require universities to "accept the military recruiters as members of their organizations" or "bestow upon them any semblance of authority." *Id.* at 305. "The military recruiter, by definition, is not a member of the law school community. He or she is a visitor and, in fact, a periodic visitor among many competing visitors." *Id. See also FAIR*, 390 F.3d at 260 (Aldisert, J., dissenting) (observing that "the Solomon Amendment simply does not impinge on the right of educational institutions to determine their membership" and "does not purport to tell colleges and universities whom to admit as students or whom to hire as professors or administrators").

The situation here is therefore completely different from that in *Dale*. There, the Court observed that there was a "forced inclusion of an unwanted person in [the] group."

Dale, 530 U.S. at 648. Moreover, the forced inclusion was particularly significant: "The application of the state anti-discrimination law required the Boy Scouts to accept a gay rights activist not merely as a member but as an assistant scoutmaster." *FAIR*, 291 F. Supp. 2d at 305. Here, in contrast, the Solomon Amendment does not require the universities to accept any point of view.

B. The Government's Significant and Compelling Interest in Ensuring National Security Overrides any Alleged Impairment of Expressive Activity at Federally Funded Institutions.

A compelling governmental interest, such as protecting national defense, can justify infringement on a constitutional right. *See Dale*, 530 U.S. at 656. The freedom of expression may be "overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 648 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

Here, the governmental interest at issue is of the utmost importance, as recognized by the trial court below. *See FAIR*, 291 F. Supp. 2d at 312 (finding that "the Solomon Amendment furthers an important government interest"). In fact, even the Court of Appeals recognized that "the Government has a compelling interest in attracting talented military lawyers." *FAIR*, 390 F.3d at 234. However, it then failed to give this compelling interest proper consideration.

This Court has long recognized that "the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances." *United States v. O'Brien*, 391 U.S. 367, 381 (1968). In support of this important governmental function,

Congress has repeatedly enacted legislation that "much like the Solomon Amendment, authorized the withholding of defense funds from schools that maintained a policy barring military recruiters or otherwise eliminated the Reserve Officers Training Corps program." *FAIR*, 291 F. Supp. 2d at 278 (citing Pub. L. No. 92-436 § 606(a), 86 Stat. 734, 740 (1972); Pub. L. No. 91-441, § 510, 84 Stat. 905 (1970); Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968)). The Court of Appeals failed to properly consider the significance of this longstanding government interest.

C. Most Secular Universities and Other Institutions of Higher Education are Demonstrably Not "Expressive Associations."

Secular universities and institutions are typically defined by an openness to a diversity of opinion, which is sometimes described as "academic freedom." They are presumptively not organizations that engage in "expressive activity" that "seeks to transmit ... a system of values." *Dale*, 530 U.S. at 650. Secular institutions of higher education are dedicated to a wholly different purpose: to expose students to a *range* of value systems and ideas, without imposing any one ideology. They are therefore completely unlike organizations that are organized around a single ideology and established to promote a single set of values.

A prime example of an "expressive association" is the Boy Scouts of America, which was the subject of this Court's ruling in *Dale*. The Boy Scouts organization was established to inculcate a specific set of principles. Those principles were embodied in a Scout oath and Scout law. The Court held that requiring the Boy Scouts to admit homosexuals as scout masters would conflict with its consistently asserted position.

Secular universities and other institutions of higher education, in contrast, are not organized around any single

ideology. As this Court has recognized, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). Universities facilitate "the free and open exchange of ideas" and "foster vibrant campus debate among students." *Board of Regents of University of the Wisconsin System v. Southworth*, 529 U.S. 217, 234 (2000). Accordingly, they routinely "encourage a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 834 (1995). In sum, "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

As this Court explained in *Rosenberger*, the very origin and mission of the secular university distinguish it from expressive associations. "In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn." 515 U.S. at 835. *See also Healy*, 408 U.S. at 180-181 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. ... Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association.").

Such "spontaneous assemblages" dedicated to open debate are fundamentally different from "expressive associations" that are organized to promote a guiding set of beliefs or principles. Thus, the Court in *Rosenberger* held that the exclusion, or even the disparagement, of particular viewpoints was fundamentally at odds with the function of a secular university: "The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." 515 U.S. at 836.

Indeed, because many secular universities are public institutions subject to constitutional limitations imposed upon government actors, there are certain restrictions on their ability to promote a particular ideology. For example, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Id.* at 828. "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* As a result, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829. Nor may the government "discriminate against speech on the basis of its viewpoint." *Id.*

This Court has held, for example, that the expulsion of a student for lewd expression in a newspaper that she sold on campus pursuant to university authorization was unconstitutional. *Papish v. University of Missouri Board of Curators*, 410 U.S. 667, 667-68 (1973). It would be inconsistent to hold that the same school could exclude someone for espousing the values of our Nation's military. In another example, this Court has held that the denial of university recognition and concomitant benefits to a political student organization was unconstitutional. *See Healy v.*

James, 408 U.S. at 174, 176, 181-182. In yet another case, this Court has held that where a university administers mandatory student fees, there is a "requirement of viewpoint neutrality in the allocation of funding support" that prohibits universities from discriminating against or excluding certain viewpoints. *Southworth*, 529 U.S. at 233. *See also Rosenberger*, 515 U.S. at 841. Finally, this Court has held that a school may not deny access to its facilities to some, but not other, groups based on their viewpoint. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393 (1993). In light of all these precedents, these schools could not constitutionally bar an advocate of our military, or a recruiter for it.

Respondents' attempt to draw analogies between secular universities dependent on federal subsidies or even state funding and private organizations like the Boy Scouts must fail. The Boy Scouts and other private associations remain free to regulate their members in order to inculcate their particular value system and to affirmatively eschew viewpoints that are inconsistent with their beliefs. If anything, respondents' *exclusion* of the military — not the Solomon Amendment — offends the values inherent in the First Amendment.

Finally, the established practice of universities and other institutions of higher education demonstrates that they are not "expressive associations." Such institutions host speakers and foster debate among their student bodies that involve positions directly contrary to those espoused by some members of the faculty or administration. In particular, universities and other institutions of higher education are not established to promote an anti-military or even anti-discrimination ideology. Even as to the merits of the present appeal, law schools around the country have sponsored panels at which opposing viewpoints regarding the military's policies and the Solomon Amendment have been fully debated. These established practices demonstrate that institutions of higher education are fundamentally

different from the organizations this and other courts have found to engage in expressive association.

IV. THE DECISION BELOW WOULD ALLOW GOVERNMENT CONTRACTORS AND GRANT RECIPIENTS TO UNILATERALLY AMEND THEIR AGREEMENTS AND IMPOSE ONE-SIDED BARGAINS THAT WERE NEVER CONTEMPLATED BY THE PARTIES.

The implications of the Court of Appeals' decision beyond the present dispute are sweeping and dramatic. The appellate decision below would allow government contractors and grant recipients to unilaterally abrogate terms of agreements with the government to which they voluntarily consented. In the process, it would create out of whole cloth a previously-unrecognized *constitutional right* to impose one-sided bargains that the parties never contemplated — all at the expense of the federal government, and ultimately federal taxpayers.

The Solomon Amendment represents merely one example of the many conditions imposed upon the recipients of federal grants and contracts that may now be alleged to touch upon First Amendment rights of speech and expression. For example, government contracts and grants routinely contain provisions that *require* recipients to submit certain reports to the government in order to ensure that government funds are properly spent and impose certain auditing requirements. *See* 32 C.F.R. § 32.26. Moreover, they require that recipients "maintain written standards of conduct governing the performance of ... employees engaged in the selection, award, or administration of a contract supported by Federal funds." 32 C.F.R. § 32.42.

Similarly, the government routinely imposes conditions and requirements that seek to promote various policy goals. For example, the government requires the establishment of procurement procedures that give preference to the extent

possible to products and services that "conserve natural resources and protect the environment and are energy efficient." 32 C.F.R. § 32.44. *See also id.* § 32.49. Similarly, it requires that "[p]ositive efforts shall be made by [contract] recipients to utilize small businesses ... whenever possible." 32 C.F.R. § 32.44. Finally, government contracts often contain provisions requiring compliance with equal opportunity guidelines contained in Executive Orders, certain minimum wage payments, reporting of environmental contamination violations, prohibitions on the use of federal funds in lobbying, and disclosure of "any lobbying with non-Federal funds." 32 C.F.R. pt. 32 App. A. The Court of Appeals' ruling, if affirmed, would allow government contract and grant recipients to challenge governmental conditions in court to possibly abrogate their obligations. Indeed, they would arguably have a *constitutional right* to do so.

No such right exists, however, under established law. To the contrary, as explained in Point I above, the Court has repeatedly affirmed the right of the government, like any other party, to impose limits or conditions on the use of its funds. *See Rust v. Sullivan*, 500 U.S. 173 (1990); *see also United States v. American Library Ass'n*, 539 U.S. 194 (2003). The Solomon Amendment, like many other federal enactments, offers potential recipients of federal grants and contracts a simple and voluntary choice: "If you do not like the Armed Forces, if you do not like its policies, that is fine. ... But don't expect federal dollars to support your interference with our military recruiters." 140 Cong. Rec. H3861 (May 23, 1994) (Rep. Solomon). This choice is no different from many other choices faced by potential recipients of the government's largesse, or recipients of many types of private donations. And the putative plaintiffs here have voluntarily *agreed* to undertake certain obligations.

Respondents now seek to deprive the federal government of the benefit of its bargain, claiming that somehow when

they voluntarily entered into these arrangements, their "rights" were violated. There simply is nothing in the Constitution, never mind notions of fundamental fairness, that would allow individuals or universities to impose such a one-sided, after-the-fact bargain. When respondents entered into agreements with the federal government or accepted government grants, they fully *knew* of the federal policies to which they object, yet they voluntarily *chose* to associate themselves with the federal government, and in particular the Department of Defense. Now they seek to unilaterally void obligations to which they *agreed* while *maintaining* these beneficial relationships. If institutions wish to avoid the requirements imposed by the Solomon Amendment, then their solution is simple: they may refrain from taking federal funds in the specified programs. Instead, respondents seek to assert a purported constitutional right to avoid obligations to which they voluntarily consented, and their argument must be rejected.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court uphold the constitutionality of the Solomon Amendment, and reverse the Court of Appeals' decision.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 Old Chester Road
Far Hills, NJ 07931
(908) 719-8608

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Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE JUDGE ADVOCATES ASSOCIATION IN SUPPORT OF PETITIONERS

SCANNED

LT. COL. GREGORY M. HUCKABEE,
U.S. ARMY (RET.)*
**Counsel of Record*
BRETT D. BARKEY, PRESIDENT
JUDGE ADVOCATES ASSOCIATION
720 Seventh Street, NW
3rd Floor
Washington, DC 20001-3716
(202) 448-1712

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. § 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the Court of Appeals erred in holding that the Solomon Amendment's equal-access condition on federal funding violates the First Amendment to the Constitution, and in directing a preliminary injunction to be issued against its enforcement.

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AMICUS CURIAE BRIEF OF THE JUDGE ADVOCATES ASSOCIATION

The Judge Advocates Association ("JAA") respectfully submits this *amicus curiae* brief in support of Donald H. Rumsfeld, *et al.*, Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the written consent of the parties.[1]

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

> *"I find it scarcely possible to get along without some legal person in the situation of Judge Advocate."* Letter from Duke of Wellington to the Earl of Bathurst (Jun. 2, 1815) (*quoted in* 5 THE OXFORD ENGLISH DICTIONARY 617 (Oxford 1933 & reprint 1970).

The JAA[2] is a non-profit corporation and national professional society. The JAA was founded in 1943 by a small group of Army Judge Advocates in Washington, D.C. Over fifty years later, the JAA is composed of active duty and retired Judge Advocates of all services as well as private practitioners of military and veterans' law. The American Bar Association (ABA) recognizes the JAA as an affiliate organization and awards it full recognition. As an affiliate of the ABA, the JAA is a member having a vote in

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[1] Counsel for Petitioners, Donald H. Rumsfeld, *et al.*, and Respondents, the Forum For Academic And Institutional Rights, *et al.*, consented to the filing of this *amicus curiae* brief. The letters of consent have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, the JAA represents that no counsel for either party authored this brief in whole or in part and that no person or entity, other than the JAA, its members, and its counsel contributed monetarily toward the preparation or submission of this brief.

[2] "The Judge Advocates Association was, and is, an organization open to military lawyers, active and inactive, of all the armed services. . . . Its support, as a surrogate spokesman . . . [is] vital." Siegel, *Origins of the Navy Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775 to 1967*, 584 (1997).

the ABA House of Delegates and has raised many issues of concern to Judge Advocates and practitioners of military and veterans' law since its inception.

Judge Advocates and members of the JAA represent, counsel, and defend the men and women who defend our great nation. By assisting commanders in the administration of military justice and providing support to ongoing military operations around the globe, Judge Advocates perform a critical function to the national security of the United States. This is not new. Consistent with this ancient and 21st Century role, the JAA seeks to ensure that the armed forces recruit and retain highly talented graduates of our nation's law schools.

The origins of the Judge Advocate and the Judge Advocate General's Corps are rooted deeply in our history. In his classic treatise on military law, Winthrop remarked that "The province of the Judge Advocate, as now understood, appears to have first become defined in the British Articles of the seventeenth century."[3] This officer, "The judge marshal, by some styled auditor-general, and since called judge advocate, was an officer skilled in the civil, municipal and martial laws: his office was to assist the marshal or general in doubtful cases."[4] Our own military was scarcely six weeks along when Congress appointed William Tudor Judge Advocate of the Army on July 29, 1775.

The JAA submits this brief to demonstrate that the application of the Solomon Amendment is a constitutional and highly effective means of recruiting quality law students to the Judge Advocate General's Corps.[5] Denying military recruiters the access needed to conduct on-campus interviews will have a detrimental impact on the

[3] W. Winthrop, *Military Law and Precedents* 179 (2d ed. 1896 & reprint 1920).

[4] *Id.* (quoting 1 F. Grose, *Military Antiquities* 235 (London 1786-88)).

[5] The term "Judge Advocate General's Corps" is used in this brief to classify all Judge Advocates serving in the United States Armed Forces.

Judge Advocate General's Corps and hinder their ability to contribute to the national security of the United States.

SUMMARY OF ARGUMENT

This case involves a First Amendment challenge to the Solomon Amendment, 10 U.S.C. § 983(b)(1). The Solomon Amendment is a federal statute that withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers.

Under the Solomon Amendment, as it stands today, certain public funds are not provided to an institution of higher education, or a subelement of that institution, if the institution or subelement has a policy or practice that prohibits, or in effect prevents military recruiters from gaining access to campuses or students "in a manner that is at least *equal* in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1) (emphasis added).

The JAA submits this brief in support of Petitioners and argues in favor of the constitutionality of the Solomon Amendment. Moreover, the JAA seeks to alert this honorable Court of the detrimental impact on the United States Armed Forces' ability to recruit and maintain qualified individuals caused by the Court of Appeals determination that the Solomon Amendment is unconstitutional. "[T]he Nation has a vital interest in having a system for raising armies that functions with maximum efficiency . . . " *United States v. O'Brien*, 391 U.S. 367, 381 (1968). Effective military recruiting is essential to that system. Particularly in this time of war, denying military recruiters the access needed to conduct on-campus interviews will have a devastating impact on the Armed Forces' ability to recruit the talented individuals necessary to protect national security and defend the Constitution of the United States.

ARGUMENT

I. The Solomon Amendment is a valid exercise of the Congressional Spending Power under the Constitution.

Congress has the solemn duty "[t]o raise and support armies . . . [and] to provide and maintain a navy" for the defense of the United States. Const. art. I, § 8, cl. 12-13. The Solomon Amendment, 10 U.S.C. § 983(b)(1), was enacted under Congress's plenary spending power to "provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Congress's power under the spending clause, coupled with the necessary and proper clause, is very expansive, *Buckley v. Valeo*, 424 U.S. 1, 90 (1976), and includes the authority to attach conditions to the receipt of federal funds. *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

As early as 1862 Congress placed conditions on the receipt of higher education funding, requiring universities and their subelements to provide assistance in military recruiting efforts. *See* The Morrill Act of 1862, ch. 130, § 4, 12 Stat. 504. Land grant colleges, to this day, are required to include in their curriculum courses on "military tactics." *Id.* (codified at 7 U.S.C. § 304).

When acting pursuant to the spending power, U.S. Const. art. I, § 8, cl. 1, which includes providing for national defense, "Congress may attach conditions to the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole,* 483 U.S. 203, 206 (1987). The "constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Id.* at 209 (citing *United States v. Butler,* 297 U.S. 1 (1936)). Further, judicial deference "is at its apogee" when reviewing "legislative action under the congressional authority to raise and support" the military. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

The Solomon Amendment remains a valid exercise on Congress's spending power so long as the conditions it places on the law schools do not rise to the level of an independent constitutional violation. *See Dole,* 483 U.S. at 208-212. As the conditions Congress has placed on law schools under the Solomon Amendment pass the strictest of scrutiny, the alleged intrusion on Respondent's First Amendment interests falls short of a constitutional violation.

II. The equal-access requirement of the Solomon Amendment is valid, despite any incidental impact on free expression, because it passes constitutional muster under both the expressive association analysis in *Dale* and the standard announced in *O'Brien* for regulations which indirectly affect free expression.

This honorable Court has held that the right of expressive association may be limited by government action necessary to serve a compelling interest unrelated to the suppression of ideas. *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (citing *Buckley*, 424 U.S. at 25). Relying on *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), the Court of Appeals elaborated on the strict scrutiny test in the expressive association context and held that, "[a] regulation that disrupts an expressive association or compels speech must be narrowly tailored to serve a compelling governmental interest, and must be the least restrictive means of promoting the government's asserted interest." *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld,* 390 F.3d 219, 230 (3d Cir. 2004). *See also Pac. Gas and Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 19 (1986). The Circuit Court erred, however, when it concluded that enforcement of the Solomon Amendment is not narrowly tailored to serve a compelling government interest and is not the least restrictive means of promoting that interest. *See FAIR,* 390 F.3d at 242. As the equal-access requirement of the Solomon Amendment does indeed survive

strict scrutiny, it necessarily meets the intermediate scrutiny test, which arguably is the more appropriate standard, set forth in *O'Brien*.

A. The Congressional interest in recruiting top-quality Judge Advocates is compelling, as these military lawyers are critical to national security, ongoing wartime operations, and the maintenance of a well-disciplined fighting force.

Congress has the independent constitutional power to "[t]o raise and support armies . . . [and] to provide and maintain a navy. . . . " Const. art. I, § 8, cl. 12-13. Further, the Constitution enables Congress "[t]o make all laws which shall be necessary and proper" for maintaining a strong military and defending our nation. Const. art. I, § 8, cl. 18. Courts have also recognized that, "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *United States v. City of Phila.*, 798 F.2d 81, 86 (3d Cir. 1986). When analyzing the congressional interest behind the Solomon Amendment, significant deference must be afforded Congress, as they acted under the congressional authority to raise and support the United States Armed Forces. *Rostker*, 453 U.S. at 70. In amending the Solomon Amendment to its current form, Congress found that

> [A]t no time since World War II, has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with *effective and uninhibited* recruitment programs.

H.R. Rep. No. 108-443(I), at 3-4 (2004) (emphasis added).

Judge Advocates are responsible for the administration of military justice. They also support "a full spectrum

of domestic and international military operations ranging from combat operations to humanitarian civic assistance and disaster relief operations."[6] Judge Advocates in the Marine Corps are also unrestricted line officers, meaning that they may be asked to serve in non-legal billets at any time.[7]

As this honorable Court has recognized, Judge Advocates, as military officers, hold "a particular position of responsibility and command in the Armed Forces: 'The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities of the appointee he is named to the specified rank during the pleasure of the President.'" *Parker v. Levy*, 417 U.S. 733, 743 (1974) (citing *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953)). Judge Advocates also take an oath "to support and defend the Constitution of the United States of America against all enemies, foreign and domestic . . . " Estes, *The Marine Officer's Guide* 225 (6th ed. 1996). From the founding of our Nation to this day, Judge Advocates "assist commanders in the administration of military justice in order to maintain morale, good order, and discipline within the ranks . . . thereby strengthening the national security of the United States."[8]

In the early courts-martial proceedings, the 1776 Articles of War required that Judge Advocates be "assigned to the court to prosecute in the name of the United States and to act as a counsel for the accused." Schlueter, *Military Criminal Justice: Practice and Procedure* 32 (6th ed. 2004) (citing Article 6). In the 1916 and 1920 enactments of the Articles of War, Congress mandated the

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[6] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 2, *FAIR* (No. 03-4433). "More than 240 Air Force [judge advocates] provide a permanent forward presence in over 40 locations in 19 foreign countries." *Id.* at 3.

[7] Report of the Staff Judge Advocate to the Commandant of The Marine Corps, Presented to the American Bar Association Mid-Year Meeting 1, 3 (Feb. 11-12, 2005).

[8] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 3, *FAIR* (No. 03-4433).

appointment of a Judge Advocate to all general and special courts-martial. *Id.* at 38 (citing Articles 11, 17). Under the Selective Service Act of 1948, which was enacted to "provide for the common defense" and "insure the security of this Nation," Congress required that the Judge Advocates of the service branches be "members of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General." 80 Cong. ch. 625, §§ 1, 206-208, 62 Stat. 604, at 604-605, 629. In today's military, almost every court-martial includes a member of the Judge Advocate General's Corps who has graduated from an ABA-accredited law school. *See* Schlueter, at 441. Further, this honorable Court has recognized that service as a Judge Advocate "includes the potential for service as a military judge." *Weiss v. United States,* 510 U.S. 163, 190 (1994) (Justice Souter concurring). Consequently, Judge Advocates "are vested with various supervisory powers over the military justice system." Schlueter, at 1092.

Today, Judge Advocates are fulfilling their critical role in "legally intensive, complex military operations" throughout the world.[9] Judge Advocates from all branches provide active-duty service members with legal assistance which "continues to be a critical component" in maintaining readiness, welfare, and morale.[10] Judge Advocates assist in the deployment of service members "by ensuring that a host of legal matters, to include addressing pending civil matters and preparing and executing wills and powers of attorney, are completed prior to a" service member's deployment.[11]

[9] Judge Advocate General's Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps, Presented to the ABA 1 (Feb. 2005).

[10] Report of the Judge Advocate General's Corps of the United States Air Force to the ABA, Midyear Meeting 23 (Feb. 11-12, 2005).

[11] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 2-3, *FAIR* (No. 03-4433).

In addition to the more traditional roles of acting as counsel in courts-martial and providing legal services, Major General Thomas J. Romig, U.S. Army, recently explained the vital function Judge Advocates perform in the ongoing Operation Iraqi Freedom and Operation Enduring Freedom (Afghanistan):

> During . . . combat operations, judge advocates provide[] critical international law support involving such topics as the legal basis for the use of force, rules of engagement, capitulation, parole and local cease fire agreements, civilians on the battlefield, war crimes investigation, negotiations with armed groups, the wearing of nonstandard uniforms, and child soldiers on the battlefield. Judge advocates are critical and much relied upon members of the military commander's staff, and move when and where their units move.[12]

Judge Advocates play a large role in building nontotalitarian governments in Iraq and Afghanistan by reestablishing the judicial systems and developing the rule of law.[13] In passing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Congress reinforced the necessity of having forward-operating Judge Advocates providing independent, legal advice to commanders in the field. *See* Pub. L. No. 108-375, § 574, 118 Stat. 1811 (2004). Ongoing combat operations in Iraq and Afghanistan have dramatically increased the demand for top-quality Judge Advocates.[14] Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of

[12] Declaration of Major General Thomas J. Romig, U.S. Army, at 4, *FAIR* (No. 03-4433).

[13] *See* Judge Advocate General' Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps, Presented to the ABA 40-42 (Feb. 2004).

[14] Report of the Staff Judge Advocate to the Commandant of the Marine Corps, Presented to the ABA Mid-Year Meeting 4 (Feb. 2004).

the Marine Corps, recently commended a Judge Advocate wounded in the battle of Fallujah:

> As the battalion's staff judge advocate, this Marine was responsible for detainee processing, oversight of contract interpreters, liaison with tribal leaders, providing humanitarian assistance (claims condolence payments), briefing rules of engagement, and drafting the legal annex to the battle plan for Operation Phantom Fury (Fallujah). *During the battle, this Marine judge advocate fought over six hours in streets and alleys firing his rifle and directing crew served weapons until he was severely wounded by a rocket propelled grenade and medically evacuated."*[15]

"[Judge Advocates] are serving with distinction in challenging billets around the world, including Iraq, Afghanistan, and Guantanamo Bay, Cuba, and in a multitude of at sea and other forward-deployed locations. Their contributions to the defense of our nation are many and significant."[16] Where do we get such selfless young men and women? We get them from the law schools that instill in them the public service ethic and skills necessary for the protection and defense of freedom, on the battlefield and off.

There is compelling government interest in ensuring that top-quality Judge Advocates continue to contribute to the defense of our nation. It is absolutely critical that we maintain the most effective recruiting measures in order to continue to fill the ranks of Judge Advocates with top-quality law students from around the nation. This includes the on-campus interview as it is the most critical part of

[15] Report of the Staff Judge Advocate to the Commandant of The Marine Corps, Presented to the ABA Mid-Year Meeting 8-9 (Feb. 11-12, 2005) (emphasis added).

[16] Report of the Judge Advocate General of the United States Navy, Presented to the ABA Annual Mid-Year Meeting 18 (Feb. 4-10, 2004).

the Judge Advocate recruiting process.[17] Even if the application of the Solomon Amendment does work some slight infringement on the law schools' right of expressive association, that infringement is justified because it serves the compelling government interest in raising and supporting a strong military and national defense. *See Rotary Club of Duarte*, 481 U.S. 537.

B. The equal-access requirement of the Solomon Amendment is narrowly tailored to the Congressional interest, and is the least restrictive means of recruiting top-quality Judge Advocates, and thus any effect on free expression is no greater than is essential.

As this honorable Court has held, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

The United States military continues to demand increasing numbers of new Judge Advocates.[18] The drastic increase in deployments has presented significant challenges to Judge Advocates in providing legal support to commanders, U.S. service members,[19] and their families. The enforcement of the Solomon Amendment is essential to supporting and maintaining the military, especially considering the "increasingly challenging recruiting

[17] Declaration of Rear Admiral Jeffrey L. Fowler, United States Navy, at 3, *FAIR* (No. 03-4433).

[18] *See* Report of the Judge Advocate General of the United States Navy, Presented to the ABA Annual Mid-Year Meeting 15 (Feb. 4-10, 2004).

[19] *See* Judge Advocate General' Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps, Presented to the ABA 37-38 (Feb. 2004).

environment" brought about by the Global War on Terror.[20] For example, with the enforcement of the Solomon Amendment, Air Force Judge Advocates were able to interview "approximately 2,275 law students representing almost all of the 188 ABA-accredited law schools in the United States."[21] If enforcement of the Solomon Amendment were prohibited, it would create a significant obstacle to Judge Advocate recruiters, one not experienced by other employers, thus placing the military at a disadvantage.

> The denial of equal access to law school campuses hampers the ability of military recruiters to recruit high-quality applicants and, ultimately, our ability to staff [the Armed Forces] with the qualified personnel needed to successfully accomplish the [] mission. Access to law students that is inferior to that provided other employers precludes the [military] from being able to reach potentially interested students in the manner that is most convenient and attractive to the students.[22]

Congress has decided that one of the requirements for serving as a Judge Advocate is to be a graduate of an accredited law school. *See* Article 27(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 827(b)(1). It follows that in filling the ranks of Judge Advocates, the Armed Forces should be allowed to interview and recruit students attending accredited law schools, especially where those schools or their parent universities enjoy federal funding. Because law students attend classes at the law school and often study there as well, it is much easier for the students when employers interview at the

[20] Report of the Judge Advocate General of the United States Air Force, Presented to the ABA Annual Meeting 1 (Feb. 6-7, 2004).

[21] Report of the Judge Advocate General's Corps of the United States Air Force to the ABA, Midyear Meeting 1 (Feb. 11-12, 2005).

[22] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 4, *FAIR* (No. 03-4433).

law school. By denying equal access, the military is at a competitive disadvantage; law students are given the impression that a career as a Judge Advocate is less desirable than a career in civilian law. If this honorable Court prohibits the enforcement of the Solomon Amendment, the Armed Forces will have to select from a smaller pool of applicants, which will impair the military's "ability to convey the great advantages and opportunities of a legal career in the Armed Forces,"[23] and ultimately result in accession of less talented Judge Advocates.[24] "The military cannot afford to recruit and access less talented candidates, given the complexities and demands of today's military environment."[25]

1. The on-campus law school interview is the most effective means of recruiting Judge Advocates, and is essential to meet accession requirements.

Congress's interest in raising and supporting an effective military is a compelling government interest. To achieve this goal, Congress has a narrowly tailored means of providing military recruiters with access to our Nation's most talented potential Judge Advocates. Each year the United States Armed Forces must recruit hundreds of Judge Advocates in order to effectively defend the nation.[26] The Army alone accesses 270 active and reserve Judge Advocates per year and has had to access an additional 50 active duty Judge Advocates as a result of ongoing operations in Iraq and Afghanistan.[27] Our national security

[23] *Id.* at 5.

[24] Declaration of Major General Thomas J. Romig, U.S. Army, at 9, *FAIR* (No. 03-4433).

[25] *Id.*

[26] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 4, *FAIR* (No. 03-4433).

[27] Declaration of Major General Thomas J. Romig, U.S. Army, at 6, *FAIR* (No. 03-4433).

depends on the good order and discipline of service members, which in turn depends on the quality of Judge Advocates supporting those forces and administering the military justice system. Enforcement of the Solomon Amendment seeks to ensure that the United States Armed Forces have "the same access to law school campuses afforded to other employers so that [they] can interview and access a sufficient number of top-quality attorneys. . . . An unsuccessful recruiting year, either in terms of quality or quantity of applicants," can significantly impair the military force structure for 20 years or more.[28]

Recruiting visits and interviews within the law schools is the most effective means of meeting the requisite accessions into the Judge Advocate General's Corps.[29] For example, among the Judge Advocates currently serving on active duty in the United States Air Force, 75% were recruited through a program which included a law school visit.[30] In the Army, 60% of all new Judge Advocates are recruited from law schools through a process that includes an on-campus interview.[31] The on-campus interview is the only method by which the military "can compete with higher paying employers and meet the strong

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[28] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 4, *FAIR* (No. 03-4433).

[29] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 4, *FAIR* (No. 03-4433).

> [O]n-campus recruiting is the preferred and most successful method of establishing contact with interested and potentially qualified applicants . . . the most effective method of recruiting potential applicants is to meet with them in person and explain to them what a career as a [] judge advocate would entail and how to go about submitting an application. This exchange is the best tool for recruiting highly qualified judge advocates.

Id.

[30] *See* Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 4, *FAIR* (No. 03-4433).

[31] Declaration of Major General Thomas J. Romig, U.S. Army, at 6, *FAIR* (No. 03-4433).

demand for face-to-face interaction with interested applicants."[32]

On-campus interviews are crucial for two reasons: 1) they provide an essential, face-to-face forum where law students can hear first hand the experience of a young Judge Advocate in today's military as well as ask questions about military law, how it differs from civilian law, and the application process,[33] and 2) the recruiting Judge Advocate is able to make an initial, face-to-face evaluation and assessment of the demeanor and character of the potential applicant, which ultimately becomes a critical component of the application package.[34] The Judge Advocate recruiter "performs vital recruiting duties [] by his or her presence on campus" and conducts "informational seminars about" the Judge Advocate General's Corps as well as interviews.[35] The recruiter provides a human face to the United States Armed Forces and "is often the first judge advocate whom a law student has ever met."[36]

Official surveys indicate that the on-campus interviews appeal "to many law students who had never previously considered a career" as a Judge Advocate.[37] Out of 339 newly-commissioned Judge Advocates, 40% identified the law school recruiting visit as the way they learned about their service branch.[38] In an Army recruiting area which consists of New Jersey, Pennsylvania and Delaware,

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[32] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 6, *FAIR* (No. 03-4433).

[33] *Id.* at 8 ("This type of exchange is invaluable in conveying what joining the [judge advocate] [c]orps really means, on both personal and professional levels, because the students are more comfortable with (and identify with) the young [judge advocate] visiting their school.").

[34] *Id.* at 5.

[35] Declaration of Major General Thomas J. Romig, U.S. Army, at 7, *FAIR* (No. 03-4433).

[36] *Id.*

[37] *Id.* at 8.

[38] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 8, *FAIR* (No. 03-4433).

over 80% of law students who attended an on-campus interview subsequently applied to become Judge Advocates.[39] Nationwide, over 54% of law students attending an on-campus interview subsequently applied to become an Army Judge Advocate.[40]

Over 83% of the Navy's new Judge Advocates "are recruited during their second and third year of law school."[41] Over 50% of the new Navy Judge Advocates "had their first meeting with Navy personnel during an on-campus interview."[42] Half of the Marine Corps' new Judge Advocates "are recruited during their second and third year of law school" through on-campus recruiting methods.[43] The Marine Corps also administers a unique commissioning program whereby aspiring Judge Advocates may become commissioned officers before attending law school. *See* 10 U.S.C. § 16401 (2005). Under this program, access to law schools is even more imperative, as the officer recruiter must monitor the academic eligibility and physical fitness of the Marine law student throughout enrollment at the law school. *See id.*

The Army and the Air Force also utilize the on-campus interviews to hire second-year law students as civilian summer interns. Over 50% of the 2003 Air Force summer interns applied to become Air Force Judge Advocates with 40% being selected.[44] In an Army recruiting area which consists of New Jersey, Pennsylvania and Delaware, over 31% of law students who attended an on-campus interview for the summer internship subsequently

[39] Declaration of Major General Thomas J. Romig, U.S. Army, at 8, *FAIR* (No. 03-4433).

[40] *Id.*

[41] Declaration of Rear Admiral Jeffrey L. Fowler, United States Navy, at 3, *FAIR* (No. 03-4433).

[42] *Id.*

[43] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 2-3, *FAIR* (No. 03-4433).

[44] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 10, *FAIR* (No. 03-4433).

applied for the internship.[45] Nationwide, over 40% of students who interviewed on-campus subsequently applied for the Army legal internship.[46]

> The [on-campus] recruiting program is thus a critical tool not only in enhancing the academic quality of the applicant pool, but, especially as it pertains to the summer internship program, in maximizing [the] ability to reach out to the widest, most diverse audience possible, thereby increasing [the] ability to field a legal corps representative of the country it serves.[47]

Whereas various programs support the recruiting and retention of Judge Advocates, "the on-campus informational interview is the centerpiece . . . of the recruiting platform. . . ." and the "[c]ontinued presence at law schools . . . will remain central in conveying accurate depictions of the JAG Corps to potential applicants."[48]

2. The government cannot recruit effectively by less speech-restrictive means.

Substantial deference should be given to the professional determinations of our military leaders of how to best ensure top-quality law student leaders are entering the Judge Advocates General's Corps. *See Goldman*, 475 U.S. at 507.

Currently, the service branches "employ[] a number of methods to supplement on-campus interviews as a means of recruiting new" Judge Advocates.[49] The

[45] Declaration of Major General Thomas J. Romig, U.S. Army, at 8, *FAIR* (No. 03-4433).

[46] *Id.*

[47] *Id.*

[48] Report of the Judge Advocate General Corps of the United States Air Force to the American Bar Association Midyear Meeting 1-2 (Feb. 11-12, 2005).

[49] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 8, *FAIR* (No. 03-4433).

branches maintain websites, publish brochures, post openings on Internet job sites, and mail letters directly to second- and third-year law students, and advertise in legal publications.[50] However, these methods, at the very best, can only serve to augment the on-campus interviews, and cannot adequately replace them.[51]

On-campus interviewing is the most successful and feasible means of recruiting new Judge Advocates. It has been suggested that loan repayment programs may be a more narrowly tailored means by which to recruit. *See FAIR,* 390 F.3d at 235. The limited student loan repayment programs employed by the branches are, however, incentives utilized to "*retain*[] experienced judge advocates" rather than as a recruiting device.[52] Further, "the continuing costs of current and future [military] operations threaten the future funding for [loan repayment programs]."[53] Therefore, the United States military may be unable to continue these loan repayment programs at some point in the future. Enforcement of the Solomon Amendment allows the United States military to keep money and manpower where it is needed the most – on the frontlines.

> Increasing the money and manpower devoted to other [alternative] methods of recruiting would

[50] *Id.*

[51] *Id.*

[52] Report of the Staff Judge Advocate to the Commandant of The Marine Corps, Presented to the ABA Mid-Year Meeting 4 (Feb. 11-12, 2005) (emphasis added). "Judge Advocate Continuation Pay (JACP) is designed to provide financial assistance for the majority of [] junior officers on active duty. . . . " Judge Advocate General' Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps, Presented to the ABA 2 (Feb. 2005). The Navy's JACP is a "valuable retention tool[]" and judge advocates are not eligible until they reach the rank of lieutenant. Report of the Judge Advocate General of the United States Navy, Presented to the ABA, Annual Mid-Year Meeting 12-13 (Feb. 4-10, 2004).

[53] Report of The Staff Judge Advocate to the Commandant of The Marine Corps, Presented to the ABA Mid-Year Meeting 4 (Feb. 11-12, 2005).

> necessarily mean diverting those resources from other demands that they are currently meeting. The growing demands of the current global military environment and our domestic budgetary process are placing increasing constraints on the Department [of Defense's] financial resources and personnel. The resources that would be needed to expand alternative recruiting methods are not lying idly by, waiting to be used; they are already in use. Thus, even if a court-ordered disruption in [law school] campus recruiting efforts could somehow be overcome by other recruiting efforts, [the nation] would pay a price in the diversion of resources required for other parts of the military mission. . . . Developing, funding, and implementing alternative methods of recruiting would unavoidably take time, and we do not have the luxury of living with impaired recruiting capabilities while the process plays out.[54]

While the Armed Forces make "substantial efforts to supplement the efficiency and effectiveness" of the on-campus interview, "there is no method or combination of methods that could replace it if it were lost."[55] The on-campus interview system "is uniquely tailored to fit in the busy law student's demanding schedule, and on-campus access provides a form of direct visibility to the [Judge Advocate General's] Corps that off-campus alternatives cannot match."[56]

> There is no adequate substitute for a personal dialogue between [a Judge Advocate recruiter] and an interested candidate. This personal dialogue allows the [Judge Advocate recruiter] to relate to the applicant and speak to them sincerely from their recent experiences. They can answer

[54] Declaration of Dr. David S.C. Chu, Under Secretary of Defense for Personnel and Readiness, at 4-5, *FAIR* (No. 03-4433).

[55] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 11, *FAIR* (No. 03-4433).

[56] *Id.*

> questions that may arise immediately and remove some of the confusion that may exist regarding what [] judge advocates actually do. Beyond the additional expense involved, neither a TV commercial, a radio advertisement, nor a website can provide the same type of information and target the appropriate audience in the same manner as campus visits do. The ability to proudly walk onto a law school campus, in uniform, and openly talk to a potential applicant is essential to our ability to highlight the many rewards and advantages of a career as a judge advocate. There is no adequate substitute.[57]

This demonstrates that the requirement of equal access is narrowly tailored to further the government's compelling interest, and is the least restrictive means to recruit top-quality Judge Advocates.

Judge advocate recruiting is an economic activity. Any expressive content is strictly secondary to the instrumental goal, which is to recruit qualified men and women to serve as military lawyers and judges. Even if, however, the Court determines that the Solomon Amendment interferes with an educational institution's expressive association or impairs the institution's First Amendment rights by compelling it to propagate, accommodate, and subsidize the military's recruiting message against its will, the Solomon Amendment is still valid because it passes strict scrutiny, that is, it is "a narrowly tailored means of serving a compelling state interest." *Pac. Gas and Elec. Co.*, 475 U.S. at 19.

C. The application of the Solomon Amendment to educational institutions does not violate the right of expressive association afforded under the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S.

[57] Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps, at 6, *FAIR* (No. 03-4433).

Const. amend. I. Respondents argue that the Solomon Amendment impairs law schools' First Amendment rights under the doctrine of expressive association because the law schools' First Amendment right to disseminate their chosen message is impaired by the inclusion of military recruiters on their campuses. This doctrine was most recently addressed by the Supreme Court in *Dale*, 530 U.S. at 640.

In *Dale*, the Supreme Court set forth the elements of an expressive association claim, which include (1) whether the group is an "expressive association," (2) whether the government action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the government's interest justifies the burden it imposes on the group's expressive association. 530 U.S. at 648-658.

1. Law schools do not enjoy a right of expressive association.

This honorable Court has illustrated the enormous educational benefit that is derived when a law school is open to the free flow of diverse viewpoints. *See Grutter v. Bollinger*, 539 U.S. 306, 327-34 (2003). The law school's "classroom with its surrounding environs is peculiarly the marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). The law schools are not speakers, but rather "possess[] many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). *See United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) (defining a public forum). *See also Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) *and Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (finding that subelements of universities amounted to forums). As forums, and not speakers, the law schools themselves do not convey ideological viewpoints and should be entitled to limited First Amendment protection. Rather, the law schools are microcosms of society – marketplaces for the exchange of popular and unpopular views. This includes the view that service to our country is honorable.

There is more to the viewpoint that the United States Armed Forces conveys than the constitutional, albeit controversial, "don't ask, don't tell" policy. *See Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 948; 10 U.S.C. § 654. The overwhelming message conveyed by our Soldiers, Sailors, Airmen and Marines is one of physical and mental discipline, adherence to a strong moral code, honor, courage, and commitment. It follows that the law schools, as the stewards of the "marketplace of ideas," should allow this message to be heard – allow it to compete freely and fairly with the other messages presented within the halls of these great institutions of justice and public service.

If the law schools do enjoy a right of expressive association, any slight infringement upon that right is justified by the compelling interest in recruiting quality Judge Advocates for service in the United States Armed Forces.

2. The Solomon Amendment does not significantly affect the group's ability to advocate its viewpoint.

Respondents argue that the Solomon Amendment significantly affects the law schools' ability to express their viewpoint that discrimination on the basis of sexual orientation is wrong. In holding that the Solomon Amendment impairs a law school's right to expressive association, the Third Circuit relied heavily on *Dale*. *FAIR*, 390 F.3d 219. In *Dale*, the Supreme Court held that applying New Jersey's public accommodations law to require Boy Scouts to admit a homosexual scout leader violated Boy Scouts' First Amendment right of expressive association. *Dale*, 530 U.S. 640. However, *Dale* can be distinguished from the present case in many ways.

First, the Solomon Amendment requires only that the institutions allow military recruiters equal access. These recruiters are not a part of the law school and do not become members through their temporary presence during the recruiting process. Recruiters speak for the employers

they represent – they do not purport to speak for the law schools they are visiting and cannot reasonably be understood to be speaking for these law schools. Therefore, unlike *Dale*, in the case at bar, the Solomon Amendment does not intrude on the right of educational institutions to determine their membership.

Furthermore, recruiting is an economic activity. Any expressive content is strictly secondary to the instrumental goal, which is to recruit qualified men and women to serve as Judge Advocates. Recruiting is not meant to convey any message beyond the military's interest in enlisting these individuals. Recruiters are not used to instill values in anyone, unlike the role of scoutmasters in *Dale*, whose fundamental goal of the relationship between adult leaders and boys was "[t]o instill values in young people." *Id.* at 650.

Finally, it is a fabrication that a military presence on campus to recruit qualified individuals to serve as Judge Advocates in and of itself conjures up an immediate impression of a discriminatory institution. It also sullies every American in uniform, past, present, and future. To ensure, however, that the students, faculty, and public do not erroneously perceive the educational institutions as endorsing the policies of the United States Armed Forces, the law schools are free to disclaim any policy held by any recruiting organization, including the United States Armed Forces. These schools can express their disagreement with the policies of the military through any appropriate means. Moreover, institutions that want to separate themselves completely from the policies of the military recruiters can simply decline to accept assistance from the federal government.

These vast distinctions illustrate that the burden imposed on the law schools' associational interests is significantly less than the burden imposed on the Boy Scouts of America by the New Jersey statute in *Dale*. Therefore, unlike *Dale*, the impact of the Solomon Amendment on law schools' interests in expressive

association is far too remote to *significantly* affect the group's ability to advocate its viewpoint.

3. The government's interest justifies the burden it imposes on the group's expressive association.

Furthermore, even if the application of the Solomon Amendment does result in a minor burden on the law schools' right of expressive association, that burden is justified because it serves the compelling government interest in raising and supporting a military.

The need for a national defense mandates well disciplined and ready forces. Top-quality Judge Advocates are essential to maintaining good order and discipline as well as advising combatant commanders during ongoing operations. The on-campus interview process is critical to Judge Advocate recruiting.[58] Enforcement of the Solomon Amendment is therefore necessary to further the government's compelling interest in defending this nation at home and abroad.

Based on the foregoing, the application of the Solomon Amendment to law schools does not violate the right of expressive association afforded under the First Amendment.

D. The Solomon Amendment satisfies the intermediate scrutiny test for expressive conduct as set forth in *United States v. O'Brien*.

As this honorable Court noted, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. "This Court has long recognized the need to

[58] Declaration of Major General Jack L. Rives, U.S. Air Force, at 5-7, *FAIR* (No. 03-4433).

differentiate between legislation that targets expression and legislation that targets conduct for legitimate non-speech-related reasons but imposes an incidental burden on expression." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 604 (2001) (Justice Souter dissenting). The law schools, in their endeavor to exclude military recruiters, are engaging in a course of conduct that contains both nonspeech and speech elements.

This honorable Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. The constitutional framework for evaluating such a government regulation is provided in *O'Brien*, and states that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

1. The Solomon Amendment is within the constitutional power of the government to raise, support, and maintain a military.

There has been no dispute that the Solomon Amendment is within the constitutional power of Congress. Congress has the constitutional power "[t]o raise and support armies . . . [and] to provide and maintain a navy . . . " Const. art. I, § 8, cl. 12-13. Additionally, the Constitution enables Congress "[t]o make all laws which shall be necessary and proper" for maintaining a strong military and defending our nation. Const. art. I, § 8, cl. 18. Furthermore, "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *O'Brien*, 391

U.S. at 377 (citing *Lichter v. United States*, 334 U.S. 742, 755-758 (1948); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942)). Therefore, the Solomon Amendment is within the constitutional power of the government to raise and support a military.

2. The Solomon Amendment furthers an important or substantial governmental interest.

Judge Advocates "have been extremely involved in homeland defense and the war on terrorism."[59] Although the more common role of the Judge Advocate is to administer the military justice system,

> [j]udge advocates provide direct advice and assistance on a daily basis to combatant commanders on issues ranging from military justice to rules of engagement, real-time target assessments, reviews of target lists, helping to establish war crime tribunals in Iraq and Afghanistan, interpretation of international treaties and advice under the law of armed conflict, to name but a few.[60]

The role of the Judge Advocate is an integral component of the security of the United States and the rule of law in the Armed Forces. Because of this important function, it is essential that the United States Armed Forces are able to recruit the most highly qualified men and women to serve as Judge Advocates. The on-campus interview process is critical to successful Judge Advocate recruiting.[61] The interviews "provide[] the most efficient and effective means by which the [military] can compete

[59] Report of the Judge Advocate General of the United States Air Force, Presented to the ABA Annual Meeting 2 (Feb. 6-7, 2004).

[60] *Declaration of Rear Admiral Jeffrey L. Fowler, United States Navy, at 2, FAIR* (No. 03-4433).

[61] Amended Declaration of Major General Jack L. Rives, U.S. Air Force, at 5-7, *FAIR* (No. 03-4433).

with higher paying employers and meet the strong demand for face-to-face interaction with interested applicants."[62] Law students learn about Judge Advocate opportunities from on-campus visits by Judge Advocate recruiters. Because the Solomon Amendment seeks to ensure that military recruiters are granted access to conduct on-campus interviews, the legislation seeks to maintain the requisite recruiting, accession, readiness, and preparedness in the Judge Advocate corps of the most talented attorneys, and therefore, furthers an important or substantial governmental interest in national security.

3. The Solomon Amendment is unrelated to the suppression of free expression.

Enforcement of the Solomon Amendment is unrelated to the suppression of ideas. The Solomon Amendment merely requires equal access for military recruiters.

> [L]aw schools are free to take ameliorative actions to disclaim any endorsement of the military's recruiting policy; in fact, law schools can outright denounce the military without running afoul of the Solomon Amendment's prohibitions. For the non-communicative impact of their conduct, and for nothing else, will law schools transgress the Solomon Amendment.

FAIR v. Rumsfeld, 291 F.Supp.2d 269, 314 (D.N.J. 2003) (citing *O'Brien*, 391 U.S. at 383). Those institutions of higher education that accept federal funds, and thus fall under the purview of the Solomon Amendment, are free to openly criticize the United States Armed Forces and its policies without the risk of losing federal funds. Therefore, the Solomon Amendment does not in any way suppress the free expression of the educational institutions to which it applies.

[62] *Id.* at 6.

4. The incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of Congress's interest in raising and maintaining a military.

The law schools, through their own recruiting procedures, have set forth what they consider "essential" conditions to effectively recruit talented and capable individuals on their respective campuses. Law schools that provide recruiters with interview facilities, disperse recruiter information, and provide assistance in scheduling interviews and setting up interview space are manifesting their own assessment of what is needed for recruiters to successfully reach potential recruits. The equal access requirement of the Solomon Amendment "is no greater than is essential" and will survive the *O'Brien* test so long as the requirement "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

The Solomon Amendment requires only equal access. It requires that these institutions give military recruiters access to the same resources that the institutions have *themselves* deemed "essential" for effective recruiting on their campuses. If these recruiting practices and procedures were not the most effective way to recruit individuals, the educational institutions would not be partaking in them. On that same note, if these recruiting practices were not the most effective way to recruit potential employees, employers would not be accepting offers to recruit on campuses, nor would they be incurring the costs necessary to do so.

Therefore, the institutions, by their own actions, have set forth what is "essential" for effective recruiting. The Solomon Amendment, by requiring only equal access to what the institutions have themselves deemed "essential" for effective recruiting, is placing no greater incidental restriction on First Amendment freedoms than is necessary to further the government's interest in recruiting

Judge Advocates to serve in the United States Armed Forces. Enforcement of the equal-access requirement does not "suppress substantially more speech than . . . necessary to ensure" the effectiveness of on-campus Judge Advocate recruiting. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994).

To satisfy the *O'Brien* standard, regulations of conduct that place incidental burdens on expression are not subject to a least-restrictive-alternative requirement. *See Turner Broad. Sys.*, 512 U.S. at 662 ("a regulation need not be the least speech-restrictive means of advancing the Government's interests"). The less stringent, intermediate scrutiny test is to be applied in circumstances where the government action has only an incidental effect on the right to free speech or expressive association. *See Pi Lambda Pi Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 446 (3d Cir. 2000) (citing *O'Brien*, 391 U.S. 367).

CONCLUSION

The equal-access requirement of the Solomon Amendment survives strict scrutiny as it is a narrowly tailored, and the least restrictive, means of advancing the government's compelling interest in recruiting the requisite quality and quantity of Judge Advocates to serve in the United States Armed Forces. The primary purpose of the Solomon Amendment is to compel or limit conduct, and not speech or expression. If the equal-access requirement of the Solomon Amendment does affect speech or expression, the effect is incidental. As enforcement of the Solomon Amendment affects the rights of freedom of speech and expressive association in an indirect and less immediate fashion, the more appropriate test to be applied would be the less stringent, intermediate scrutiny test.

The Solomon Amendment is a valid exercise of Congressional spending power under the Constitution, and Congress and our military leaders have determined that enforcement of the Solomon Amendment is the only effective means of ensuring that top-quality law student

leaders are entering the Judge Advocates General's Corps. Denying Judge Advocate recruiters the access needed to conduct on-campus interviews will have a detrimental impact on the Judge Advocate General's Corps and hinder their ability to contribute to the national security of the United States.

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

LT. COL. GREGORY M. HUCKABEE,
U.S. ARMY (RET.)*
**Counsel of Record*
BRETT D. BARKEY, PRESIDENT
JUDGE ADVOCATES ASSOCIATION
720 Seventh Street, NW
3rd Floor
Washington, DC 20001-3716
(202) 448-1712

Attorneys for Amicus Curiae

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In the

Supreme Court of the United States

DONALD H. RUMSFELD, et al.,

Petitioners,

v.

FORUM FOR ACADEMIC
AND INSTITUTIONAL RIGHTS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

JOHN H. FINDLEY
*HAROLD E. JOHNSON
*Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of neither party.[1]

Founded in 1973 and headquartered in Sacramento, California, Pacific Legal Foundation (PLF) is a nonprofit public interest law foundation with a commitment to First Amendment freedoms, such as are relevant to this case. In particular, this case involves interpretation and application of a landmark First Amendment ruling, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). PLF submitted friend of the court briefs in defense of the First Amendment rights in *Dale* as well as in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001); and *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192 (D.C. 2002). PLF attorneys currently represent one of the petitioners in *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Ct. App. 2002), *rev. granted*, 65 P.3d 402 (Cal. Mar. 26, 2003) (No. S112621) (concerning a punitive city policy directed at the Evans petitioners because of their affiliation with the Boy Scouts of America).

PLF also supports robust enforcement of the unconstitutional conditions doctrine (one of the legal issues in the case at bar); PLF attorneys were counsel for petitioners in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), a milestone application of unconstitutional conditions analysis.

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF believes its public policy perspective and litigation experience in constitutional law will provide a helpful perspective in the resolution of this case.

SUMMARY OF ARGUMENT

The court below relied on *Boys Scouts of America v. Dale*, 530 U.S. 640 (2000), in concluding that the Solomon Amendment flouts the Constitution by forcing institutions of higher education to accommodate military recruitment even if they oppose United States military policies related to homosexuality.

Amicus offers no position on whether the ruling should be affirmed. Rather, Amicus files this brief to urge against any withdrawal or limitation of *Dale*. Limiting *Dale* is not necessary in order to uphold the decision below; likewise, limiting *Dale* is not required in order to overturn the decision below.

If this Court finds that the law school Respondents are private expressive organizations (like the Boy Scouts); that their tenets are subverted if they are forced to accommodate military recruiters; and that no compelling governmental interest supersedes expressive rights in this context, then *Dale* can be invoked to strike down, or limit, the Solomon Amendment.

On the other hand, fully upholding the Solomon Amendment would not require limiting *Dale*. *Dale* did not declare First Amendment associational and expressive rights to be absolute. This Court could rule against the law schools—and still show allegiance to *Dale*—if it found that the Solomon Amendment furthers a compelling interest in a narrowly tailored way.

Dale is one of the key civil rights decisions of the last 100 years, because it rejected the proposition that government may compel private expressive organizations to abandon their beliefs and belief-based organizational policies. Yet it still is

under assault—rhetorically, politically, and legally—by opponents of the liberties that it defends. Whatever the Court decides in this case, it can further a compelling *constitutional* interest by leaving *Dale* intact—and by reiterating *Dale*'s important role as a safeguard of First Amendment freedom.

ARGUMENT

I

THE COURT SHOULD REJECT ANY SUGGESTION THAT *DALE* BE ABANDONED OR LIMITED

The Solomon Amendment conditions federal funding to universities on their permitting military recruitment on campus—even at schools, such as Respondents, that claim their antidiscrimination policies are at odds with the military's refusal to allow acknowledged homosexuals to serve. In striking down this mandate—in declaring that the First Amendment protects Respondent law schools from the compulsion decreed by the Solomon Amendment—the court below invoked *Dale*.

Dale dealt with the First Amendment right of an expressive association not to be forced by government to abandon its organizational beliefs. This Court held that New Jersey ran "afoul of the Scouts' freedom of expressive association" by trying to dictate Boy Scout organizational policies in opposition to Scout convictions. 530 U.S. at 656. As the district court in *Till* distilled the teaching of *Dale*, "the Boy Scouts have a First Amendment right to freedom of expressive association, which includes the right to exclude homosexuals as members or leaders in the organization." 136 F. Supp. 2d at 1308.

The court below declared that the Solomon Act's coercion of Respondents is as unconstitutional as New Jersey's coercion of the Boy Scouts: "[J]ust as the Boy Scouts believed that 'homosexual conduct is inconsistent with the Scout oath', the

law schools believe that employment discrimination is inconsistent with their commitment to justice and fairness." *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 232 (3d Cir. 2004).

There are critics of *Dale* who have voiced the hope that this Court's review of *Rumsfeld* might possibly lead to *Dale* being limited, or even abandoned. For instance, writing in the online commentary service, Slate, Stanford Law School Professor Richard Thompson Ford criticizes both *Dale* and the Solomon Amendment, and says he'd "love to see them both go; forced to choose, I hope the court will spare Solomon and ditch *Dale*." Richard Thompson Ford, *But the Scouts, Your Honor*, Slate, May 6, 2005, *available at* http://slate.msn.com/id/2118217.

However, whether this Court upholds the ruling below or reverses it, it may—and it should—do so without disturbing *Dale*.

A. The Decision Below May Be Reversed Without Weakening *Dale*

The elements for a claim that First Amendment rights of expressive association have been violated are three:

> (1) [W]hether the group is an "expressive association," (2) whether the state action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the state's interest justifies the burden it imposes on the group's expressive association.

Rumsfeld, 390 F.3d at 231 (citing *Dale*, 530 U.S. at 648-58).

The court below found that the law school Respondents are "expressive associations" because they satisfy the test of engaging in "some form of public or private expression above

a *de minimis* threshold." *Id.* (citing *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3d Cir. 2000)).

The court below also found the second prong of the *Dale* test satisfied: The Solomon Amendment, according to the court, "significantly affects the law schools' ability to express their viewpoint" opposing discrimination in hiring, by compelling them to host, and to expend their resources to accommodate, a "discriminatory" employer, namely the United States military. *Rumsfeld*, 390 F.3d at 231-32. Here, the court followed *Dale*'s precept that "deference" should be given "to an association's view of what would impair its expression." *Id.* at 233 (citing *Dale*, 530 U.S. at 640).

Third, the court below found that the Solomon Amendment does not represent a narrowly tailored means of advancing a compelling governmental interest, because the "military has ample resources to recruit through alternative means . . . that do not require the assistance of law school space or personnel." *Rumsfeld*, 390 F.3d at 235.

Dale, then, was found to be on all fours with the case at hand. By definition, affirming the ruling would not require any departure from *Dale*. Amicus wishes to stress that the same would hold for *reversing* the ruling: It could be done without retrenching on *Dale* in any way. Amicus does not urge either reversal or an affirmance, only that this Court issue its decision without altering *Dale*—and, indeed, preferably take the occasion to restate *Dale*'s importance and precedential value.

To reverse the ruling below without doing violence to *Dale*, would require focusing on the third *Dale* element—whether a compelling governmental interest supersedes the First Amendment claims in this context. As for the first two elements, the court below defined and applied them in a way that is entirely consistent with *Dale*, so to challenge the decision on those points would risk revising, and narrowing, *Dale*.

1. This Court Should Not Define "Expressive Organization" in a Restrictive Way

Dale applied an expansive approach to identifying an expressive organization and expressive activity. The Court did not question in any way the Boy Scouts' status as a private organization or an expressive organization. The general rule that the Court recognized has broadly inclusive implications: In order to qualify as an expressive organization, a group merely "must engage in some form of expression, whether it be public or private." *Dale*, 530 U.S. at 648.

Accordingly, the court below was able to agree with the law school Respondents that they are expressive organizations —because their antidiscrimination policies put forward a viewpoint—and to defer to the law school Respondents' determination of what regulatory restrictions curtail their expressive rights. *Rumsfeld*, 390 F.3d at 231-35.

Insisting on a narrower framework as to what constitutes a private expressive organization would not just depart from *Dale*'s example, it would have the effect of narrowing the private domain in our society and expanding the sphere of the public and governmentally regulated domain. In contrast, recognizing and according First Amendment rights to "a full range of civil associations"—as *Dale*'s precedent instructs—leads to a "larger role for civil associations vis-a-vis government in creating social norms," so that the shape and direction of society evolves spontaneously through citizens' free-will choices and decisions rather than through top-down bureaucratic dictate. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485, 534 (2002).

2. This Court Should Not Depart from *Dale*'s Deference Toward Expressive Organizations in Identifying Their Beliefs and Threats to Those Beliefs

Dale recognized a similarly deferential standard for identifying an expressive organization's beliefs and what regulations might threaten them. With regard to the Boy Scouts' claims as to what they officially believe on issues of sexual morality— claims that had been contested by the New Jersey Supreme Court when it ruled against the Scouts—this Court said, simply, "We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression" on the issue. *Dale*, 530 U.S. at 651. "[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.*

The court below showed similar deference to the law-school Respondents. Showing less deference to private organizations as to what their animating beliefs are and how they might be infringed through regulatory overreach, would subvert the freedom-enhancing effect of *Dale*. Is *Dale*'s rule—that the expressive organization should be allowed to articulate its own message and identify governmental threats to it—too permissive? No, answers Professor Kmiec:

> The dangers of government censorship, of interference with the right of individual citizens within their chosen intermediate associations to work through the difficulties or moral or political questions, is too sensitive and too important to allow a more demanding standard of proof [from the private organization]. The freedom of expression and association is the individual's, after all, not the government's.

Symposium, *The Supreme Court's Most Extraordinary Term*, 28 Pepp. L. Rev. 667, 668 (2001).

3. This Court Should Confine Its Scrutiny to the "Compelling State Interest" Issue

Reversing the ruling below on the third prong of the *Dale* test would not subvert *Dale*, because *Dale* propounds no rules, relevant in this context, as to what governmental interest is compelling enough to outweigh the First Amendment rights at issue. If the Court were to find that military recruitment constitutes a compelling interest—and that requiring law schools to cooperate is narrowly tailored to serve that interest—then the ruling could be reversed without *Dale* being scaled back. Amicus offers no opinion on whether the Solomon Amendment appropriately serves such an interest; Amicus stresses only that it is this question—the compelling interest question—that must be the focus if this case is to be adjudicated without undermining *Dale*.

B. As a Seminal Civil Rights Decision, *Dale* Should Be Scrupulously Respected, Whichever Way This Case Is Decided

This Court not only *can* decide the case at bar without disturbing *Dale* (whether the ruling below is affirmed or rejected), it *should* render its decision in a way that leaves *Dale*'s principles and holding intact. This is because *Dale* is one of the seminal civil rights decisions of the last 100 years; it secures fundamental freedoms by rejecting the ominous idea that government may compel private expressive organizations to abandon or attenuate their beliefs. If the Boy Scouts had been forced to adopt government-scripted policies that the Scouts believed would water down their organizational commitments, the implications for expressive organizations across the philosophical spectrum would have been chilling. Writing in a pre-*Dale* case, California Supreme Court Justice Kennard articulated the peril: If the right of expressive

association is denied the Scouts, "[c]ould the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?" *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 257 (Cal. 1998) (Kennard, J., concurring).

"*Dale* can be understood as protecting the autonomy of civil society from the state." McGinnis, *supra*, at 533. "By granting . . . substantial space for a private organization to exclude individuals whose mere presence is antithetical to their expressive norms, the Court turned the First Amendment into a powerful tool for private articulation of social norms." *Id.*

Dale powerfully buttresses a Tocquevillian conception of society. The tendency to associate for purposes of social uplift, or instruction or advocacy, was cited by Tocqueville as an especially healthy aspect of American society—a bulwark of liberty, in fact. "Americans of all ages, all stations in life, and all types of disposition are forever forming associations," he wrote. Alexis de Tocqueville, *Democracy in America* 485 (J.P. Mayer & Max Lerner Eds., 1966).

> There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England

> some territorial magnate, in the United States you are sure to find an association.

Id. at 485.

Tocqueville regarded the associational impulse not just as a social benefit, but also as a force for freedom, protecting against the "omnipotence" of the majority and serving as a "dike to hold back tyranny of whatever sort." *Id.* at 177.

By insisting on a bright line of demarcation between the public sector and the private sector, and ensuring constitutional protection of private expressive organizations against encroachments by the state, *Dale* represents perhaps this Court's most significant contribution to "the conditions [necessary] for local and private processes to work"—in other words, for the engines of freedom to flourish. McGinnis, *supra*, at 570. *Dale* itself must therefore be nurtured and protected with the same jealousy applied to other great civil rights rulings.

C. The Court Should Take This Opportunity to Reaffirm *Dale*, Which Is Under Assault from Ideologically Motivated Bureaucrats and Interest Groups

While a decision can be rendered either way in this case without disturbing *Dale*, that does not mean *Dale* should be ignored here. To the contrary, the opportunity should be seized to reaffirm *Dale*'s central place in this Court's jurisprudence.

This is because *Dale* is under attack.

1. Government Entities in Various Parts of the Country Have Attempted to Undermine *Dale* by Punishing the Exercise of the Rights That *Dale* Safeguards

A number of ideologically motivated government entities, in various parts of the country, have attempted or are presently attempting to subvert it. Some examples:

- Soon after *Dale* was issued, the school board of Broward County, Florida, voted to bar the local Boy Scouts from further use of school facilities after hours—while continuing to allow other private groups to meet on school premises. Relying on *Dale*, the district court issued a preliminary injunction, holding that the School Board could not "punish [the Scouts] for [the Scouts'] own message." *Till*, 136 F. Supp. 2d at 1308. Citing *Dale* for the principle that the Scouts have a First Amendment right to their beliefs, the court informed the school district that it could not retaliate against the Scouts on account of those beliefs. *Id.*

- In June, 2001, the District of Columbia Human Rights Commission demanded that the local Scouts readmit two men as adult members who had been dismissed because they were acknowledged homosexuals. *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d at 1195-97. The District of Columbia Court of Appeals reversed, pointing out that the Commission's action could not "be reconciled with *Dale*." *Id.* at 1200.

- In August, 2002, the city council of Ann Arbor, Michigan, voted, in effect, to punish the Boy Scouts for the viewpoints that *Dale* protects; the city withdrew from United Way participation, because of the Scouts' leader-selection policies. Subsequently, Washtenaw United Way officials voted to stop directing any United Way funds to the Boy Scouts, and the city responded by rejoining the United Way's fund-raising campaign. *See* Maryanne George, *Ann Arbor, United Way*

reunite; Group alters Scout tie over its ban on gays, Detroit Free Press, Mar. 6, 2002, at 3B, *available at* 2002 WLNR 7592919.

- In November, 2002, a California court of appeal upheld a Berkeley city action that excludes the Berkeley Sea Scouts from a free berthing program for nonprofits at the Berkeley Marina. The exclusion is imposed because Berkeley officials consider the Boy Scouts a "discriminatory" organization due to their assertion of the rights recognized by *Dale*. *See Evans*, 127 Cal. Rptr. 2d at 696. The California Supreme Court has granted review. Pacific Legal Foundation attorneys represent one of the petitioners challenging Berkeley's financial punishment of the Sea Scouts as a violation of First Amendment and Equal Protection rights. *Id.* at 703-05.

- In July, 2003, a federal district court in San Diego ruled that the city's lease of park property to the Boy Scouts violates the federal Establishment Clause, because the Scouts' core principles—protected by *Dale*—include belief in God. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). This anti-Scout ruling has been appealed to the Ninth Circuit.

2. The Court Below Correctly Held That Conditioning Public Benefits on Surrender of First Amendment Rights is Unconstitutional; This Court Should Affirm That Finding

Notably, one of the prime tactics in the governmental assaults on the Scouts—and on *Dale*—involves threats to exclude the Scouts from generally available public programs, benefits, or facilities if they do not abandon the constitutional rights guaranteed by *Dale*. This amounts to unconstitutional conditions being imposed on an expressive organization. In this case, the court below recognized that such *indirect* assaults on a constitutional freedom are as impermissible (absent a

compelling governmental interest and narrow tailoring) as a *direct* assault—i.e., an outright prohibition—on exercise of the constitutional right. *Rumsfeld*, 390 F.3d at 243. The court found a violation where government "*conditions funding* on the law schools' propagation" of expression that contradicts their asserted viewpoints. *Id.* (emphasis added). Even if this Court were to overturn the ruling below—by finding the Solomon Amendment to be a narrowly tailored way to serve a compelling interest—it should not criticize, *but rather should endorse*, the articulation below of the doctrine of unconstitutional conditions, not least because that doctrine safeguards *Dale* from subversion by ideologically inspired bureaucrats.

"The unconstitutional conditions doctrine prevents the government from penalizing those who exercise their constitutional rights by withholding a benefit that would otherwise be available." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 796 (2d ed. 2002) (citations omitted).

In *Nollan v. California Coastal Comm'n*, 483 U.S. at 834, this Court affirmed the petitioners' right not to have private property taken by the state without the compensation guaranteed by the Fifth Amendment.

In holding that the Coastal Commission acted unconstitutionally when it refused to issue a building permit to the Nollans unless they agreed to grant an unrelated public easement on their property, *Nollan* employed the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2087 (2005) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

Just as conditioning a generally available benefit on the relinquishment of rights is prohibited in the realm of the Fifth Amendment, so it is barred (absent narrow tailoring and a compelling governmental interest) as a device to undermine First Amendment freedoms. Indeed, the principle that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests is "especially" true where "his interest [is] in freedom of speech." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (citation omitted). *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 716 (1981) ("[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny [tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000) ("[S]pecial consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression.").

This Court has consistently held that a group may not be excluded on the basis of its views or expressive identity from a publicly provided benefit for which it otherwise qualifies. *E.g., Good News Club v. Milford Central School*, 533 U.S. 98, 106-12 (2001); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 828-37 (1995); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 268 (1981); *Healy v. James*, 408 U.S. 169, 181 (1972).

Because the protection of the *Dale* precedent is so important—and because *Dale* is under assault through strategies involving unconstitutional conditions—the Court should take the opportunity afforded by this case to reiterate the vitality of the unconstitutional conditions doctrine in the First Amendment context.

CONCLUSION

For the reasons stated above, Amicus respectfully urges that, however the Court rules on the merits of this case, it reaches its decision in a way that protects and respects *Dale* as the important civil rights precedent that it is.

DATED: July, 2005.

Respectfully submitted,

JOHN H. FINDLEY
*HAROLD E. JOHNSON
*Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

(5)

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In The
Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

AMICI CURIAE BRIEF OF U.S. CONGRESSMAN RICHARD POMBO, NEW JERSEY AND PENNSYLVANIA LAW STUDENTS ELIZABETH P. RIZZO, DAVID WASSERMAN, AND DANIEL L. STANTS, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY*
**Counsel of Record*
JOSEPH F. BECKER
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the Pombo-Solomon Amendment's equal access condition on federal funding violates the First Amendment to the U.S. Constitution and in directing a preliminary injunction to be issued against its enforcement?

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AMICI CURIAE BRIEF OF CONGRESSMAN RICHARD POMBO, NEW JERSEY AND PENNSYLVANIA LAW STUDENTS ELIZABETH P. RIZZO, DAVID WASSERMAN, AND DANIEL L. STANTS, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amici curiae* brief in support of Donald H. Rumsfeld, *et al.*, Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amici curiae* brief is filed with the written consent of the parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

Congressman Richard W. Pombo was sworn in to his seventh term in the United States House of Representatives in January of 2005. He represents the Eleventh Congressional District of the State of California, which comprises San Joaquin, Alameda, Contra Costa, and Santa Clara Counties. Congressman Pombo has been active in ensuring that the Reserve Officers' Training Corps ("ROTC") is allowed on college campuses and he set a precedent in steering the passage of the Pombo-Solomon amendment, the legislation at issue in this Petition. Congressman Pombo has been rewarded by several organizations for his activism in reducing government regulations, taxation, and spending, including the United

[1] Counsel for Petitioners, Donald H. Rumsfeld, *et al.*, and Respondents, the Forum For Academic And Institutional Rights, *et al.*, consented to the filing of this *amici* with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for either party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

States Business and Industrial Council, National Taxpayers Union, Americans for Tax Reform, and the U.S. Chamber of Commerce.

Elizabeth P. Rizzo is a resident of the State of New Jersey and a full-time law student at Rutgers University School of Law, a public university in New Jersey. Prior to entering law school, Ms. Rizzo was an inflight training instructor for Continental Airlines. She currently is an officer of the Rutgers University School of Law Federalist Society.

David Wasserman is a resident of the State of New Jersey and a full-time law student at Seton Hall University Law School. Prior to entering law school, Mr. Wasserman worked in the office of a New Jersey Senator, Barbara Buono. He is currently a member of the College Democrats and the Jewish Law Students Association.

Daniel L. Stants is a resident of the State of Pennsylvania and a part-time law student at Duquesne University School of Law. Prior to entering law school, Mr. Stants served as a United States Air Force navigator and has more than 1,800 hours of flight time, including combat. He is currently a published member of the Law Review at Duquesne University School of Law.

MSLF is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion, and assembly. For example, MSLF was a party in *Mountain States Legal Foundation v. Colorado*, 946 P.2d 586 (Col. App. 1997), and counsel in *Montana Chamber of*

Commerce v. Argenbright, 226 F.3d 1049 (9th Cir. 2000) (*cert. den. sub nom. Communities for A Great Northwest v. Vaughey*, 534 U.S. 817 (2001)). MSLF believes that its expertise on the guarantees of the U.S. Constitution regarding First Amendment freedoms will assist this Court.

REASONS FOR GRANTING *CERTIORARI*

The Court should grant *certiorari*: (1) to restore the only means by which taxpayers may limit or direct spending through their elected representatives; (2) to protect the rights of Congressional Members to represent properly the fiscal and political interests of their constituents and to legislate on matters of vital public policy; (3) because the lower court erred and, in so doing, denied associational rights of students and potential employers at federally funded state and private schools; and (4) because balancing the rights of Congress to exercise its enumerated power of raising an army and the alleged First Amendment rights of Respondents, the Forum for Academic and Institutional Rights ("FAIR"), *et al.*, tips heavily in favor of Congress.

ARGUMENT

I. THE POLITICAL PROCESS IS TAXPAYERS' ONLY CHECK ON DELETERIOUS GOVERNMENT SPENDING AND MUST BE PROTECTED BY THIS COURT.

For years, this Court has held that, absent some particularized injury, taxpayers have no standing to raise issues with respect to how their tax dollars are appropriated. "The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid

and will result in taxation for illegal purposes, has never been passed upon by this court." *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). "Standing to sue may not be predicated on an interest of the kind which is held in common by all members of the public because of the necessarily abstract nature of injury all citizens share; concrete injury, whether actual or threatened, is that indispensable element of dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974).

Instead, to exercise this political check on deleterious spending, "[m]embers of Congress . . . are chosen to speak for those who elected them." *U.S. Postal Service v. Hustler Magazine, Inc.*, 630 F.Supp. 867, 871 (D.C. Cir. 1986). "As the framers of the Constitution expressly contemplated, a Senator or Congressman should naturally 'take care to inform himself of [his fellow citizens'] dispositions and inclinations. . . . '" *Id.* (citing *The Federalist* No. 35, at 221 (J. Cooke ed., 1961)). "It is this dependence on public opinion that helps to forge "the strong chords of sympathy between the representatives and the constituent." *Id.*

"Besides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents." *Williams v. U.S.*, 71 F.3d 502, 507 (5th Cir. 1995). "[T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive." *Gravel*

v. U.S., 408 U.S. 606, 653-654 (1972). "[S]o necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents." *Id.*

As such, absent this Court upholding the right of taxpayers to allocate spending through their elected members of Congress, taxpayers are left with no constitutional or fiscal check on the government's allocation of the taxpayer's earnings.

II. MEMBERS OF CONGRESS HAVE A RIGHT AND DUTY TO REPRESENT THEIR CONSTITUENTS ON MILITARY AND FISCAL MATTERS AND ARE ENTITLED CONSTITUTIONALLY TO GREAT DEFERENCE FROM THE COURTS ON SUCH MATTERS.

> This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, at 391 (James Madison) (Benjamin Fletcher Wright ed., 1961).

> Candidates for office engage in heated contests and the victor is he who receives the greatest number of votes from his constituents. These campaigns are run on platforms that include

statements of intention and undertakings to promote certain policies.

* * *

These promises are geared, at least in part, to the interests of the Congressman's constituency. Members of Congress may be legally free from dictation by the voters, but there is a residual conviction that they should have due regard for the interests of their States or districts, if only because on election day a Member is answerable for his conduct.

* * *

Serving constituents is a crucial part of a legislator's ongoing duties. Congressmen receive a constant stream of complaints and requests for help or service. Judged by the volume and content of a Congressman's mail, the right to petition is neither theoretical nor ignored. It has never been thought unethical for a Member of Congress whose performance on the job may determine the success of his next campaign not only to listen to the petitions of interest groups in his State or district, which may come from every conceivable group of people, but also to support or oppose legislation serving or threatening those interests.

U.S. v. Brewster, 408 U.S. 501, 556-557 (1972) (J. White, dissenting).

In representing those constituent interests, "this Court's cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. *See, e.g., Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947); *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970)." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (complete cites omitted).

In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937).

Moreover, Congress receives great deference from this Court in conditioning receipt of federal benefits on recipient behavior. This is especially true when the conditions required serve to accomplish one of Congress's enumerated powers (such as raising a military). *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987).

The Founding Fathers empowered Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). *See also, Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Service Comm'n*, 330 U.S. at 143-144; *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)).

The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." "Thus, objectives not

thought to be within Article I's 'enumerated legislative fields,' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. at 207.

Moreover, this case does not merely involve the customary deference accorded congressional decisions. Instead, it arises "in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). This Court has recognized consistently Congress' "broad constitutional power" to raise and regulate armies and navies. *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975).

Congress has the power "To raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981).

In considering a challenge to the selective service laws, this Court noted that, "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See Lichter v. United States*, 334 U.S. 742, 755 (1948).

Not only is the scope of Congress' constitutional power in this area broad, the lack of competence on the part of the courts is marked. In *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), this Court noted:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.[2]

"It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view." *Chappell v. Wallace*, 462 U.S. 296, 300-301 (1983). The right of Congressman Pombo and other members of Congress to represent the political will of their constituents and so legislate regarding military matters must be retained and *certiorari* should be granted to overturn the lower court's decision to the contrary.

III. THE THIRD CIRCUIT ERRED ON THE LAW AND, IN SO DOING, DENIED STUDENTS' ASSOCIATIONAL RIGHTS.

In *South Dakota v. Dole*, 483 U.S. at 207-208, this Court carefully delineated the requirements upon Congress when it conditions the receipt of funds. In its opinions, this Court has articulated several general restrictions. "The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of 'the general welfare.'" *Id.* at 207-208 (*citing Helvering*, 301 U.S. at 640-641; *United States v. Butler*, 297 U.S. at 65). However, "[I]n considering whether a particular expenditure is intended to serve general public purposes, courts should

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[2] *See also Orloff v. Willoughby*, 345 U.S. 83, 93-94 n.5 (1953); *Rostker*, 453 U.S. at 64-66.

defer substantially to the judgment of Congress." *Id.* at 207 (*citing Helvering*, 301 U.S. at 640, 645).

"Second, this Court has required that if Congress desires to condition the States receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. at 207-208 (*citing Pennhurst State School*, 451 U.S. at 17).

"Third, this Court's cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *South Dakota v. Dole*, 483 U.S. at 207-208 (*citing Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). *See also, Ivanhoe Irrigation Dist.*, 357 U.S. at 295 ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof").

"Finally, this Court has noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. at 207-208 (*citing Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269-270 (1985); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*); *King*, 392 U.S. at 333 n.34 (1968)).

A. The General Welfare And More Specific Powers Were Invoked By Congress.

Arguably, Congress does not have to rely only on the General Welfare clause in this case insofar as it is, rather,

acting under more definite (and actually enumerated) constitutional powers.[3] This Court has recognized consistently Congress' "broad constitutional power" to raise and regulate armies and navies. *Schlesinger*, 419 U.S. at 510.

Moreover, Congress has been largely entrusted with defining "the general welfare." *Helvering*, 301 U.S. at 640, 645. Further, it is untenable to suggest that Congress' providing for the "common defence" of the United States is somehow at odds with the "general welfare," given that both phrases are within the same conjunctive constitutional phrase.[4]

B. Congress Was Not Ambiguous And The Recipients Were Knowledgeable As To Terms Requested Upon Receipt.

This Court has held that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' *See, Steward Machine Co.*, 301 U.S. at 585-598; *Harris v. McRae*, 448 U.S. 297 (1980)." *Pennhurst State School*, 451 U.S. at 17.

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[3] Congress has the power "To raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker*, 453 U.S. at 59.

[4] "The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . . " U.S. Const. art. I, § 8, cl. 1.

The federal government was in no way ambiguous as to the restraints placed on funding recipients, especially such that "sophisticated" universities were somehow caught unaware as to congressional requirements offered as a condition of the universities' receipt of federal funds. To the extent Congress was in any way unclear, the U.S. Department of Defense made clear those conditions through the promulgation of regulations, as well as through the sending of letters to the universities specifically detailing the implications of the Pombo-Solomon Amendment. *FAIR v. Rumsfeld*, 390 F.3d 219, 228 (3rd Cir. 2004).

C. The Raising Of A Military Is Served By The Pombo-Solomon Amendment

The objective to be carried by Congress' conditioning of federal funds is that of raising a military. Placing military recruiters where career-seeking potential recruits live and study is related directly to Congress' stated objective.

D. The Pombo-Solomon Amendment Is Not Otherwise Constitutionally Barred.

The Third Circuit erred in finding independent constitutional bars to Congress' conditional grant of educational funds.

This Court has held that its language in earlier opinions stands for the unexceptionable proposition that the power of the purse may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment

would be an illegitimate exercise of Congress' broad spending power. *South Dakota v. Dole*, 483 U.S. at 210-211.

No such claim is made by FAIR here and for good reason: FAIR has not, as a condition of accepting the money, been required to violate anyone's constitutional rights![5] Rather, the schools comprising FAIR, after freely exercising their rights to associate with the federal government in exchange for funding, now claim that their own associational rights just exercised were somehow violated. The schools comprising FAIR can hardly be said to have had their rights violated when they agreed, as a term of their "contracts," to be so limited.

Amici believe that much insight can be gleaned and many parallels drawn from this Court's likening of conditional spending to the deeply rooted and time-tested principles of contract law. *Supra* Section III(B). Much as a military member or federal employee could be said to have waived voluntarily certain of his free speech rights as a

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[5] A more straightforward and honest approach would have been for FAIR to assert associational standing and sue the Department of Defense on behalf of its gay student members against whom the Department of Defense allegedly discriminates (or so FAIR argues implicitly). Absent a suspect class, however, an equal protection claim against the Department's "don't ask, don't tell" policy would be subject only to rational basis scrutiny, which, of course, would be fatal to FAIR's claims. Instead, FAIR creatively cloaked its challenge to the "don't ask, don't tell" policy in First Amendment attire in an attempt to achieve strict scrutiny review. To the extent the Court recognizes FAIR's case for the contrivance it likely is, this Court should grant *certiorari* to remedy the split between the Third Circuit and almost every other Circuit that has addressed the constitutionality of the military's policy. *See, e.g., Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996) ("We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in [10 U.S.C.] § 654(f)(3)(A).").

term in his enlistment or employment contract, so too would others, who choose freely to associate with the federal government, be barred from raising constitutional claims, at least those that they have waived in the terms of their "contracts."

But, as with contracts, it is those who are not parties to the contract whose rights cannot be violated as a condition of the contract, but that is not at issue here. Rather, the schools comprising FAIR attempt to assert their own rights despite their status as a "contracting party."

Important here is that no third parties' rights are violated as a result of the "contract" between the federal government and the schools, as would be the case in the Court's examples above ("discriminatory state action or the infliction of cruel and unusual punishment"). *South Dakota v. Dole*, 483 U.S. at 210-211. To deny the existence of the contract, however, would be to deny the rights of those taxpayers whose only means of limiting government taxation and spending are through their elected representatives.

Under the Constitution, the federal government certainly could not demand that one negative right be waived in exchange for another; that is, government may not demand that one choose between free exercise and due process, for example. Such would simply constitute a violation of the waived right. Of course, this is not what is occurring here. Rather, FAIR exercises its negative right of free association to claim and benefit from a positive right bestowed by the federal government. Apparently lost on FAIR is that the federal government has no obligation and would be free, at its own discretion, to deny all funding of law schools or, for that matter, all educational institutions. Law schools do not have a constitutional right to funds

with which to operate at some taxpayer's expense. The ultimate irony is that an organization that calls itself FAIR wants to ignore its required performance under the "contract" and wants the contract declared void, yet still demands performance by the other party, that is, it wants the money.

It is much more likely that the schools comprising FAIR violate the constitutional rights of others by failing to abide by their "agreement" with the federal government. For example, a state school's non-acquiescence to the terms of its own contract with the federal government not only breaches that agreement but, in so doing, denies the free speech rights of federal employees (military recruiters) as well as the associational rights of students such as *amici* Rizzo, Stants, and Wasserman. As such, if Rutgers University engages in content-based speech regulation and denial of associational rights, it runs afoul of the New Jersey Constitution and must stand ready to be sued under that Constitution by both military recruiters and the students whose access to those recruiters has been limited.[6]

Moreover, the constitutional protection afforded speech ensures not only the right to speak but also, as importantly, the right to "hear, learn and know." *Kleindienst v. Mandel*, 408 U.S. 753, 771 (1972) ("The First

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[6] "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, § 6. "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." N.J. Const. art. I, § 18.

Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know").

Thus, *Amici* Rizzo, Stants, and Wasserman have a constitutional right to hear the speech, both spoken and unspoken, that occurs when military recruiters appear on their campuses. Even if, *arguendo*, FAIR's members had not consented already to the presence of recruiters as a condition of funding, it is beyond cavil that the students' right to hear that speech is at least on par (if not greater) than the right of FAIR's members to bar speech to which they object.[7] That is especially the case here because, just as the dissent at the Third Circuit speculated they were "sophisticated" enough to do,[8] FAIR members and their law professors vigorously exercise their First Amendment rights to excoriate the U.S. Armed Forces whose members are soon to appear on campus.

For sophisticated law students like *Amici* Rizzo, Stants, and Wasserman, their law schools and law professors leave no doubt that: (1) the military engages in

[7] FAIR members' claim, with regard to speech, is not truly a plea for the removal of a burden upon their right to speak, but rather a demand for the imposition of a ban upon the right to speak of those with whom FAIR members disagree.

[8] "[L]aw school students, and to be sure, their professors, are an extraordinarily sophisticated and well-informed group, who understand perfectly well that their schools admit military recruiters not because they endorse any 'message' that may be conveyed by the recruiters' brief and transitory appearance on campus, but because the economic consequences of the [Pombo-] Solomon Amendment have induced them to do so. The likelihood that the military's recruiting will be seen as part of a law school's own message is particularly small when schools can take-and have taken-ameliorative steps to publicize their continuing disagreement with the military's policies and the reasons for their acquiescence in military recruiting." *FAIR v. Rumsfeld*, 390 F.3d 219, 257 (3rd Cir. 2004) (Circuit Judge Aldisert, dissenting).

activities that they find abhorrent; (2) the activities in which the military engages violate the ethical codes to which they adhere; and (3) they would not admit military recruiters if they did not feel compelled to do so due to the potential loss of federal funds under the Pombo-Solomon Amendment.[9]

Lastly, male students receiving federal financial aid have already expressed a willingness to so associate insofar as the federal government requires draft registration as a condition of individual federal financial aid. *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984).

The schools comprising FAIR exercised their First Amendment rights when accepting federal funds on the terms accompanying those funds. They were free not to do, as at least one college has done. FAIR and its ilk could take a lesson from Hillsdale College, a shining beacon of principle, which has, through exercising its associational rights, chosen not to munch at the federal trough.[10]

[9] *Supra* Note 8. This is also evidenced by FAIR's very filing of this lawsuit.

[10] Hillsdale College has chosen, as a matter of principle, not to accept or to allow its students to accept federal financial aid. Through private donors, funds are provided in the form of replacement grants and low-interest student loans. Such awards are in amounts equal to and commonly in excess of the amounts that students eligible for federal aid could receive from federal programs. http://www.hillsdale.edu/admissions/financial_faqs.asp

IV. EVEN IF, *ARGUENDO*, FAIR'S FIRST AMENDMENT RIGHTS WERE VIOLATED, THOSE RIGHTS ARE NOT ABSOLUTE AND BALANCING THOSE RIGHTS WITH THOSE OF CONGRESS STRONGLY FAVORS PETITIONERS.

Contrasting FAIR's high-minded abhorrence for discriminatory behavior in its Pombo-Solomon amendment challenge with that of their members' assertion to this very Court of a right to discriminate "affirmatively" on the clearly immutable characteristic of race and gender in their admission and professorial hiring policies suggests that no one is abridging FAIR's constitutional right to be wholly inconsistent. *See Grutter v. Bollinger*, 539 U.S. 306 (2003). FAIR argues for its right to be diverse by discriminating against those with immutable characteristics or members of suspect classes while denying Congress the right to recruit a non-diverse group with no suspect class discrimination.

But even if, *arguendo*, FAIR's First Amendment rights somehow hung in the balance in this case, any balancing of competing interests weighs heavily in favor of Petitioners. "The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 344 (2003). They may be circumscribed when necessary to further a sufficiently strong public interest. *Greer v. Spock*, 424 U.S. 828, 842-843 (1976). Congress has the power "To raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker*, 453 U.S. at 59.

Other judicially sanctified congressional methods of achieving the same goals here speak volumes toward the constitutionality of Congress' conditions on recipients in this case. For example, Congress could, for a mere fraction of the money it spends on federal financial aid simply condemn office space on every college campus by eminent domain in which to place a recruiting office and the universities would be powerless to stop it. Certainly, governmental condemnation actions far less related to any genuine "public use" have met constitutional muster in recent years.[11]

Any associational rights violations claimed by FAIR could be deemed only whimsical in light of this Court's upholding Section 12(f) of the Military Selective Service Act, which denies federal financial assistance under Title IV of the Higher Education Act of 1965 to male students between the ages of 18 and 26 who fail to register for the draft. *Selective Service System*, 468 U.S. 841 (1984) (held constitutional when challenged on other grounds). If Congress may condition an individual student's right to receive federal financial aid on his having personally registered for the draft, certainly Congress may condition institutional funds on recruiters being given equal treatment with respect to other employers. In fact, the constitutionality of past conscription itself demonstrates that even potential students' First Amendment rights to associate freely stand no chance, on balance, when up against Congress' power to raise an army.

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[11] *See, e.g., Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

CONCLUSION

The Court should grant *certiorari*. Only by doing so may the Court restore the sole means by which taxpayers may challenge deleterious spending; that is, through their elected representatives and the political process. Moreover, the rights of Members of Congress to represent those interests of vital public policy must be restored. Further, this Court should grant *certiorari* because the lower court erred and, in so doing, denied associational rights of prospective employers at federally-funded state and private schools as well as denied improperly the rights of students to associate and to "hear, learn and know" that which the military recruiters have a First Amendment right to convey on campus. Finally, on balance, FAIR's tenuous and non-absolute First Amendment claims pale in comparison to Congress' right to exercise its enumerated power of raising a military.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
**Counsel of Record*
JOSEPH F. BECKER
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amici Curiae

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In the
Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

GERALD WALPIN*
KATTEN MUCHIN ROSENMAN
575 Madison Avenue
New York, New York 10022
(212) 940-7100

* *Counsel of Record*

Attorneys for Amici Curiae (i) Center for Individual Rights, (ii) Current Law Students Travis Bass, Timothy Bell, Austin Berry, Igor Birman, Clifford Blair, Eric Boden, Tom Burrell, Nick Carter, JoHanna Cox, Joe Dallaire, Bradley L. Davis, Emily Dewey, R. Alex Dufour, Brian J. Ellis, Jr., Andrew A. Eveleth, Robert Farling, Christine Feil, Michael Francisco, Ryan K. Geddie, Daniel Austin Green, Joseph Griffo, Jamie Hall, Lawrence Hansen, Ronald Herrick, Zachary Jacobs, Shawnnessy Jiwa, Sonya Jones, Alan Kan, Gary Lawson,

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Interest of *Amici Curiae*

Amici are three groups interested in furthering academic freedom on law school campuses, and halting the imposition by law school administrations and faculty of what they believe to be politically-correct views on each and every student, who should have the academic freedom to decide for themselves what they wish to hear and accept. The three *Amici* groups are as follows:

1. The Center for Individual Rights ("CIR") is a non-profit public interest law firm, founded in 1989 to provide free legal representation to deserving clients who cannot otherwise afford legal counsel. CIR regularly represents students and professors whose First Amendment rights are infringed by the administrations of higher education institutions. CIR is dedicated to enhancing academic freedom and opposing the imposition on students of college administrations' views as to what is correct thinking.

2. Students at various law schools,[1] who are deeply concerned that the decision below is inconsistent with their academic freedom to hear expressions of view and offers of employment without restrictions imposed by the views of the law school administration and faculty.

3. A group of veterans who served our country in the military forces and received this nation's highest military honor, the Medal of Honor, for, as exemplified in one citation, "conspicuous gallantry and intrepidity in action at the risk of his life above and beyond the call of duty" and thereby "saved the lives of 1 U.S. advisor and 13 allied soldiers," while "single-handedly killing 3 and wounding

[1] These students attend the following law schools: American; Arizona State; Ave Maria; Brooklyn; Cardozo; Case Western; Catholic; Chicago-Kent; Columbia; Cornell; Emory; Georgia State; George Washington; Harvard; Hawaii; Idaho; Illinois; Indiana; Kansas; New Mexico; New York; North Dakota; Oklahoma; Oklahoma City; Pepperdine; Richmond; Rutgers; San Francisco; Seton Hall; SMU-Dedman; South Carolina; South Dakota; Southern California; Texas Tech; Texas Wesleyan; Thomas Cooley-Lansing; Toledo; Utah; Vermont; Villanova; Virginia; Wake Forest; Washburn; Western New England; and Whittier.

several others" of the enemy, during his service in Vietnam. They seek to file this brief because they believe that not allowing equal access to the military to be heard by students who wish to hear that employment viewpoint makes a mockery of basic freedom principles of this country for which they and their colleagues fought and, as to many, gave their lives.

Counsel for all parties have consented to the filing of this brief.

Summary

The court below held unconstitutional the Solomon Amendment on the ground that the free speech and association rights of law schools, faculty members, and some students -- commonly known as academic freedom -- have been violated by the federal government's conditioning of federal funds on granting military recruiters access to students, who wish to interview with the military, equal to that granted to all other interviewing employers.

In upholding plaintiffs' right to prevent students who wish to hear what the military has to say, the court below has misused the important campus right of academic freedom. In an edict reminiscent of double-think in Orwell's *1984*, the decision below asserts that it is enforcing academic freedom by preventing all students -- the primary beneficiaries of academic freedom -- from exercising their First Amendment right to listen, on campus, to the message of the military. The right of freedom of association, on which respondents and the court below rely, does not provide a right to deny others their right to associate and hear the military message. The Solomon Amendment does not violate any First Amendment right of law schools, faculty and students because they remain free to decline federal funds or, as an alternative, accept those funds while expressing their opposition to military policy. And allowing military recruiters on campus to the same extent as all other recruiters does not communicate an endorsement of the military, just as

no endorsement is communicated of any or all civilian recruiters provided access to the campus.

Therefore, because the Solomon Amendment does not condition the grant of federal funds on any unreasonable restriction of First Amendment rights, it should not have been held unconstitutional. If any infringement is involved, it is minimal and incidental and thus does not overcome the Government's right to condition the grant of federal funds on the acceptance of a condition furthering an important Governmental policy -- military recruitment.[2]

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[2] It is significant that, while respondents assert the military's violation of the law schools' policy against discrimination, they focus only on sexual orientation discrimination. In fact, the military "discriminates" against applicants on the basis of age (maximum 34 years old for active duty and 39 for reserve duty) and disability (must be able bodied), both of which are precluded by the law school's policy. This suggests that respondents recognize the military's right to fix requirements for employment consistent with the military's judgment, but are merely using this lawsuit to cause a revocation of the don't-ask-don't-tell policy. *Amici* take no position on that issue, but believe that the proper forum for that goal is Congress, which enacted that policy (10 U.S.C. § 654), not the courts.

Argument

This Court has repeatedly held that Congress has "wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States v. American Library Ass'n Inc.*, 539 U.S. 194, 203 (2003). See also, *e.g.*, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). Invoking this rule, Congress enacted the Solomon Amendment, 10 U.S.C. § 983(b), which conditions the grant of federal funds to any institution of higher education on allowing, or allowing equal access to, military recruiters for the purpose of informing students who wish to hear of the benefits of employment in the military. That conditioning of all federal funds on non-discrimination against military recruiters in access to employment services of the grantee university is similar to the conditioning of all federal funds on "[non-]discrimination . . . in the availability or use of any academic . . . or other

facilities of the grantee," upheld by a unanimous Court in *Lau v. Nichols*, 414 U.S. 563, 567-68 (1974).[3]

The Constitution and prior decisions by this Court have made clear that military recruitment -- the policy objective of the Solomon Amendment -- is a fundamental and overriding public interest that has as its ultimate aim the preservation of our country's very existence. See, *e.g.*, Const. Art. I, § 8, cl 12-13; 10 U.S.C. § 503(a); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003); *United States v. O'Brien*, 371 U.S. 367, 377 (1968). Respondents have so conceded: "There is no question that government's interest in raising an army is important, even compelling . . .; and so, too, we can presume, is its interest in hiring JAG lawyers." Respondents Brief In Opposition to Petition For Certiorari p. 23. For this purpose, as the Third Circuit recognized, "Congress considers access to college and university employment facilities by military

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[3] Overruled on other grounds, *Alexander v. Sandoval*, 532 U.S. 275 (2001).

recruiters to be a matter of paramount importance." *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). In our contemporary world, in which military conduct is microscopically examined in light of international law, treaties, and assertions of human rights abuse, military recruitment of high quality and quantity of lawyers is obviously essential to military performance. Apparently for these reasons, the court below "presume[d] that the Government has a compelling interest in attracting talented military lawyers." *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 234 (3d Cir. 2004).

The court below, however, overrode the undisputed governmental interest in military recruiting, in holding the Solomon Amendment unconstitutional, because it found that conditioning federal funds on equal access for military recruiters violated academic freedom. In fact, the Solomon Amendment works no infringement on academic freedom. To the contrary, its effect is to enhance academic freedom by

inducing institutions of higher learning to allow those students who wish to hear the military message to do so, instead of deterring students from hearing that message because an administration views military policies as politically incorrect.

In the context of respondents' assertion that the Solomon Amendment is unconstitutional because it violates academic freedom, we must look to this Court's expressed definition of academic freedom and of First Amendment free speech. This Court has repeatedly held that the First Amendment insures the right to "'receive information and ideas.'" *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), quoting from *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *Accord*, *Board of Education v. Pico*, 457 U.S. 853, 866-67 (1982). This freedom to receive information that a person wishes to hear "is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press and political freedom." *Id.* at 867 (emphasis in original). Further, "[t]his

Court has recognized that this right is 'nowhere more vital' than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. at 763.

"The college classroom with its surrounding environs is particularly the 'marketplace of ideas,'" which is inherent in "academic freedom." *Healy v. James*, 408 U.S. 169, 180-81 (1972). A marketplace of ideas requires a "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), in part quoting from *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). This aim requires that "students must always remain free to inquire, to study and to evaluate. . . ." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Plaintiffs totally misconceive the concept of "academic freedom" when they assert that it is violated by conditioning receipt of federal funds on allowing military recruiters equal

access to those students who seek to listen to that message. The Court below fallaciously construed academic freedom as the college administration's right to impose its views on the student body, even though various students seek to hear or express contrary views. It is axiomatic that it is the antithesis of academic freedom for one group of students and faculty members (these plaintiffs) to preclude the dissemination of a message that other students wish to hear, merely because these plaintiffs disagree with the message.

The law schools properly proclaim in this lawsuit that they have the duty to protect academic freedom. But they apparently misconstrue academic freedom as primarily for the benefit of administration and faculty, with academic freedom for students restricted through administration-proclaimed self-serving definitions of politically correct and acceptable forms of thought and speech designed to limit free expression on campus. Academic freedom is not the exclusive property of college administrations and some group

of faculty members. Rather, it is the education of students for which colleges exist, with students being the primary beneficiaries of academic freedom. The law school administrations are the fiduciaries of that right, ensuring its implementation for the students' benefit.

This Court in *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003), recognized, in an analogous context, the need to protect the First Amendment rights, not of the institution, but of the patrons of the institution. Rejecting a claim of violation of libraries' First Amendment rights, this Court "assum[ed]" such right, but looked to whether "their patrons' First Amendment rights" had been violated, because they were the ultimate beneficiaries of free speech rights. *Id.* at 214. So too, in the law school context, the students are the ultimate beneficiaries, whose rights are not restricted, but enhanced, by being allowed to hear different employment opportunities.

This Court in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), emphasized the importance of the administration's role in protecting the academic freedom of students, not of the college administration:

> The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in . . . its college and university campuses.

Id. at 836.

While this Court's decision in *Rosenberger*, which addressed higher education administration restriction of students' right to hear "a diversity of views from" speakers (*id.* at 834), was in the state action context,[4] the reasoning is

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[4] Although a § 1983 cause of action may not be available against non-state schools, the definition of academic freedom in those cases is relevant to determining whether any merit exists to these respondents' assertion that the Solomon Amendment is unconstitutional because it violates their academic freedom. Finding that it did not, under this Court's definitions of academic freedom, would require reversal of the decision below. It hardly needs saying that such finding is not inconsistent with holdings that § 1983, in the context of academic freedom, is limited to state

likewise apt here. There, the university paid for printing costs of student publications, but withheld such payment from one student publication because of the message it communicated, asserting that the University could not permit its association with that message -- just as plaintiffs here assert that the law schools would be associated with the military's message. This Court in *Rosenberger* agreed that, if the student publication's view were attributable in any way to the University, the administration's action in denying funding of the publication would have been upheld. But "[i]t does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from [different] speakers."

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institutions. In a § 1983 law suit, the plaintiff affirmatively asserts a violation of academic freedom in order to declare the school's conduct to be unconstitutional. Here, no party is seeking to declare any school's conduct to be unconstitutional. Indeed, each school remains free to deny equal access to military recruiters. But, if respondents' assertion that the Solomon Amendment violates their academic freedom is rejected, the Government can continue to withhold federal funds.

Id. Then, in words directly applicable to the instant issue, this Court explained:

> A holding that the University may not discriminate based on the viewpoint of [non-University] persons whose speech it facilitates does not restrict the University's own speech. . . .

Id. at 834. To emphasize that point, this Court stated that the "distinction between the University's own favored message and the private speech of students is evident. . . ." *Id.* That same distinction, between the law schools' message and the private academic freedom rights of students to hear the military's message, is equally evident here.

In holding that, by precluding students from the freedom to choose to listen to the military option, it protected associational freedom, the court below turned that freedom on its head. This Court, in *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), explained that the basis for the freedom of expressive association was to accord "protection to collective effort on behalf of shared goals" in order to

"preserv[e] political and cultural diversity and" to "shield[] dissident expression from suppression by the majority." Here, purportedly in the name of freedom, the court below has allowed law schools to prohibit those students who wish to hear the military message from doing so on campus, because, presumably, the majority do not like that view. Further, no school administration in this country can seriously contend that all students, in enrolling in a college or law school, agree to a specified viewpoint on such subjects as military and sexual orientation policies. There is therefore no signing-on to a "collective effort on behalf of shared goals" on those and other policies on which students may hold divergent views. Indeed, the true shared goals of students in higher education recognize the protection of divergent views, not imposition of views held by a majority. This Court recently emphasized the importance of diversity, not uniformity, of ideas within a student body. *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003). For that purpose, the First Amendment means "that each person should decide for

himself or herself the ideas and beliefs deserving of . . . consideration." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). The law schools, by seeking to prevent each student from equal access to consider the military's message, are thus in fact denying First Amendment rights to students, and not, as the court below held, protecting against a violation of academic freedom.

Other decisions by this Court support the conclusion that the court below erred in relying on the First Amendment rights of the law school administrations, rather than the academic freedom rights of the students. For example, in *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), this Court recognized the entity's First Amendment interest as subordinate to that of the entity's "members" in noting that SEC "regulations that limit management's ability to exclude some shareholders' views from corporate communications do not infringe corporate First Amendment rights." *Id.* at 14 n.10. And, in another

analogous context, this Court rejected broadcasters' claim that their First Amendment rights were violated when the FCC required them to allow fair comment by any person attacked by broadcasters, because "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

The decision below must be reversed even if the associational rights of the school administrations, as distinguished from the academic freedom of students, were a determinative consideration. The linchpin of the holding that the Solomon Amendment violated the schools' associational rights is that the presence of military recruiters on campus would communicate the law schools' endorsement of the military's anti-gay policies. This assertion finds no support in the practicalities of campus recruiting. No one assumes that a law school allows recruiters only from employers endorsed by the law school and with whom the law school

and its faculty agree. For example, recruiters may interview on behalf of NOW (pro-abortion) as well as on behalf of an anti-abortion legal group, obviously without the suggestion of endorsement of either position. Similarly, no one would suggest that the law school has incurred liabiiity by endorsing a prospective employer who, after making employment offers, becomes bankrupt before the employment starts, as has occurred, causing financial loss to any student who had accepted employment with that employer.

This Court has previously held in similar circumstances no endorsement of views can be found when an entity gives access to its premises for the expression of a differing view. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court rejected the suggestion that the First Amendment rights of a private shopping center owner could be implicated by being compelled to allow individuals to express themselves on its property through circulation of

petitions. In reasoning equally applicable to law schools having military recruiters present on campus, this Court held:

> The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner. . . . [Also] appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.

Id. at 87. Likewise here, plaintiffs can disavow any connection with the military recruiters, and have expressly done so, thereby avoiding even a scintilla of association with their views.[5]

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[5] The court below questioned whether "the Solomon Amendment, as recently amended, . . . permit[s] law schools to disclaim the military's message." 390 F.3d at 240-41. That court thus ignored the government's representation to the contrary in its brief below, repeated herein in its petition for certiorari, pp. 14-15, and the many record recitations of law schools, their faculty and student criticism of military policies when military recruiters were on campus. Indeed, the court below admitted that the "record is replete with references to student protesters and public condemnation." 390 F.3d at 245. Given these record references to vocal objections to military policies which have greeted military recruiters, and the absence of any claim that the government threatened loss of federal funding on the basis of such conduct, the Third Circuit's comment is obviously erroneous.

To affirm the lower court's ruling that the academic freedom of law school administrations allows them to bar the expression of a military point of view with which the administrations disagree would open the floodgates of administration censorship of students' freedom to hear and present diverse views.[6] If the military can be banned on the basis of the administration's decision to disassociate from the military's homosexual policy, administration control over student freedom of expression would be unlimited. An administration could reject the military for anti-war or anti-U.S. foreign policy reasons, unrelated to the military's homosexual policy. And depriving students of information would not be limited to the military. An administration could

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[6] We again recognize that non-state schools are not necessarily proscribed from denying academic freedom to their students. But, given the holding by the court below -- that the Solomon Amendment is unconstitutional because it violates academic freedom -- it is necessary to define academic freedom in this context, whether a state or non-state school is involved. There is no basis to define academic freedom of students differently depending upon whether the students attend a state or non-state schools, particularly on the determinative issue here as to whether the Solomon Amendment violates academic freedom.

also, for example, bar campus access to a pro-choice speaker on the ground that the view is immoral as espousing discrimination against unborn babies, or deny access to a pro-life speaker because the view denies women their constitutional rights to decide. Some administrations' attack on Israel as immorally persecuting Palestinians would equally allow barring a speaker on behalf of Israel. Administrations' opposition to "association" with an "unacceptable" view would totally override students' academic freedom rights.

Rejecting law schools' right to bar military recruiters because of the view they represent would not abrogate administrators' ability to exercise appropriate authority over student actions to prevent school disruption. A holding that law schools may not assert a claim to institutional academic freedom to violate students' academic freedom to hear divergent views would have no effect on law schools' continuing right to prevent criminal or other disruptive

conduct by all parts of campus population -- administration, faculty and students. Unlike conduct that higher education administrators have a right to prevent, whether because it is criminal conduct or contrary to campus civility, the military policy on homosexuals (10 U.S.C. § 654) is not only not criminal but has been upheld by the courts. *E.g.*, *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996).

The Court below's reliance on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), is misplaced. The plaintiff in *Hurley* -- a homosexual -- sought to require his participation in an expressive parade limited to those who agree with the sponsor's message, akin to a Republican seeking to require participation in a Democratic Party parade. This Court found that the parade

organization was not "merely 'a conduit' for the speech of participants in the parade," but "'itself a speaker.'" In that parade context, plaintiff's "participation would likely be perceived as having resulted from the [sponsor's] customary determination about a unit admitted to parade, that its message was worthy of presentation and quite possibly of support as well." *Id.* at 575. No such perception is likely here where the purpose of employment fairs is not to convey an overall message, but an opportunity for students to hear the employment opportunities message of each diverse interviewer.

This Court, in *Hurley*, distinguished *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), with language particularly relevant here:

> In *Turner Broadcasting*, we found this problem absent in the cable context, because "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."

515 U.S. at 576. And,

> Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. . . . [T]he parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.

Id. at 576-77.

Akin to programming made available on cable networks, all potential employers, participating in an employment fair, present "individual, unrelated segments that happen to be" made available "for individual selection by members of the audience" -- here, students -- without any single message distilled from the opportunity. There is thus, applying the *Hurley* reasoning, no danger that the law school administrations would be tarred with the views of any single employer interviewer, including the military.

Dale is distinguishable because, unlike here where no special position is given to any one of many recruiters, Dale would have been accorded a special leadership role as assistant scoutmaster, a leadership and role-model position over young scouts, compromising the Boy Scouts' position on homosexuality. Significantly, the four dissenters in *Dale* (Justices Stevens, Souter, Ginsburg and Breyer), while disagreeing as to the scoutmaster's special position, made clear that, here, admitting diverse recruiters would not implicate the law schools' First Amendment rights. To paraphrase those dissenters' view:

> It is not likely that [any law school] would be understood to send any message, . . . simply by admitting someone as a [recruiter]. . . . The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those [recruiters] may express . . . is simply mind boggling.

Dale, 530 U.S. at 697.

Although, as we have shown, the Solomon Amendment works no infringement of First Amendment rights because it enhances students' ability to consider varying messages,

"[e]ven if [the statute] does work some slight infringement on [law schools'] right of expressive association, that infringement is justified because it serves the State's compelling interest. . . ." *Board of Directors of Rotary Int'l v Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). An infringement "may be justified by [statutes and] regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Here, Congress properly found that the military would be hindered in its recruitment efforts if it did not have equal access to students, as part of the single employment program most law schools schedule, in a location (often the law school itself) convenient to all students. Thus, "even if enforcement of the Act causes some incidental abridgement of . . . protected speech, that effect is no greater than necessary to accomplish the [Government's] legitimate purposes," *id.* at 628, and should be allowed. See also *Bob*

Jones University v. United States, 461 U.S. 574 (1983): Burdening colleges' exercise of First Amendment religious liberty rights by withdrawing tax benefits "will inevitably have a substantial impact on the [school's] operation" (*id.* at 603-04), but such "'limitation on religious liberty'" is justified "'by showing that it is essential to accomplish an overriding governmental interest'" (*id.* at 603, quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

The court below faults the government for failing "to produce any evidence that [the Solomon Amendment] is no more than necessary to further the Government's interest." 390 F.3d at 246. The Constitution does not require the government to disprove that other solutions would meet the government's need less restrictively but with equal effectiveness. Otherwise, "the undoubted ability of lawyers and judges," who are not constrained by budgetary worries and other practical parameters within which Congress must operate, "to imagine *some* kind of slightly less drastic or

restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting) (emphasis in original). *Accord*, *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring): A "judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." The court below improperly ignored these directions against judicial second-guessing of legislative decisions by suggesting alternate solutions for military recruitment needs in "loan repayment programs [or] television and radio advertisements" which the Third Circuit admitted "may be more costly" 390 F.3d at 234. Further, the court below, in suggesting a more costly approach, gives no reason to doubt the intuitive proposition that a program focused on a limited target audience of students already interested at a known time

and location, is more effective than an unfocused general public one.

Conclusion

The Solomon Amendment does not infringe academic freedom. Rather, it enhances academic freedom of students by conditioning the grant of federal funds on permitting students to choose to hear the military recruiter's message. As the decision below depends on an erroneous finding that the Solomon Amendment violates the First Amendment, it should be reversed.

Respectfully submitted,

Gerald Walpin
Katten Muchin Rosenman
575 Madison Avenue
New York, New York 10022-2585
(212) 940-7100

Attorneys for *Amici Curiae*

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In the Supreme Court of the United States

DONALD H. RUMSFELD, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

PAUL D. CLEMENT
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioners

E. JOSHUA ROSENKRANZ
Heller Ehrman LLP
Times Square Tower
7 Times Square
New York, New York 10036-6524
(505) 842-9960

Counsel of Record
for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED: FEB. 28, 2005
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 03 Civ. 4433 (JCL)

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, A NEW JERSEY MEMBERSHIP CORPORATION, SOCIETY OF AMERICAN LAW TEACHERS, INC. A NEW YORK CORPORATION, COALITION FOR EQUALITY, A MASSACHUSETTS ASSOCIATION, RUTGERS GAY AND LESBIAN CAUCUS, A NEW JERSEY ASSOCIATION, PAM NICKISHER, A NEW JERSEY RESIDENT, LESLIE FISCHER, A PENNSYLVANIA RESIDENT, MICHAEL BLAUSCHILD, A NEW JERSEY RESIDENT, ERWIN CHEMERINSKY, A CALIFORNIA RESIDENT, AND SYLVIA LAW, A NEW YORK RESIDENT, PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE; ROD PAIGE, IN HIS CAPACITY AS U.S. SECRETARY OF EDUCATION; ELAINE CHAO, IN HER CAPACITY AS U.S. SECRETARY OF LABOR; TOMMY THOMPSON, IN HIS CAPACITY AS U.S. SECRETARY OF HEALTH AND HUMAN SERVICES; NORMAN MINETA, IN HIS CAPACITY AS U.S. SECRETARY OF TRANSPORTATION; AND TOM RIDGE , IN HIS CAPACITY AS U.S. SECRETARY OF HOMELAND SECURITY, DEFENDANTS

[Filed: Oct. 15, 2003]

SECOND AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. This case is about the freedom of educational institutions, specifically law schools, to shape their own pedagogical environments and to teach, by word and deed, the values they choose, free from government intrusion. It is about whether the government may compel law schools to lend their resources, personnel, and facilities to propagate a message they abhor-a message of discrimination that violates the core values they inculcate in their students and faculty. The names and addresses of the parties to this lawsuit are: Plaintiff Forum for Academic and Institutional Rights, Inc. ("FAIR") is a membership corporation organized under the laws of the State of New Jersey and its address is Dwyer & Dunnigan, L.L.C. c/o Andrew Dwyer, 17 Academy Street, Suite 1010, Newark, NJ 07102. Plaintiff The Society of American Law Teachers, Inc. ("SALT") is a corporation whose members are law faculty and its address is Society of American Law Teachers, Inc. c/o Paula C. Johnson, Syracuse University College of Law, E.1. White Hall, Syracuse, NY 13244. Plaintiff The Coalition for Equality is an association whose address is The Coalition for Equality *clo* Gerald Mays and Sara Smolik, Boston College Law School, 885 Centre Street, Newton, MA 02459. Plaintiff Rutgers Gay and Lesbian Caucus is an association whose address is Center for Law and Justice, 123 Washington Street, Newark, NJ 07102. Plaintiff Pam Nickisher is an individual whose address is 63 Marrow Street, Newark, NJ 070103. Plaintiff Leslie Fischer, Ph.D. is an individual whose address is 63 Marrow Street, Newark, NJ 07013. Michael Blauschild is an individual whose address is 101 Bleeker Street, No. 64, Newark, NJ 07102. Plaintiff Erwin Chemerinsky is an

individual whose address is 329 N. Fuller St., Los Angeles, CA 90036. Plaintiff Sylvia Law is an individual whose address is 3 Washington Sq. Village, New York, NY 10012. Defendant Donald Rumsfeld is the Secretary of Defense whose address is 1000 Defense Pentagon, Washington, D.C. 20301-1000. Defendant Rod Paige is the Secretary of Education whose address is United States Department of Education, 200 Constitution Ave., N.W., Washington, DC 20202. Defendant Elaine Chao is the Secretary of Labor whose address is United States Department of Labor, 200 Constitution Ave., N.W., Washington DC 20210. Defendant Tommy Thompson is the United States Secretary of Health and Human Services whose address is United States Department of Health and Human Services, 200 Independence Ave., S.W., Washington, DC 20201. Norman Mineta is the Secretary of Transportation whose address is United States Department of Transportation, 400 7th Street, S.W., Washington, DC 20590. Tom Ridge is the Secretary of Homeland Security whose address is Department of Homeland Security, Washington, DC 20528.

2. For over a decade, nearly every accredited law school has maintained policies against offering its resources, support, or endorsement to any employer that discriminates. These non-discrimination policies apply whether the employer discriminates on the basis of race, national origin, gender, veteran status or any number of other attributes that, in the law schools' judgment, bear no relation to merit-including sexual orientation. In following this policy, law schools do not simply make a statement that invidious discrimination is a moral wrong and impart that view to their students; they also commit themselves to behave in a

manner consistent with their core value of judging people solely on their merits.

3. When law schools' non-discrimination policies came into conflict with the military's policies on sexual orientation-an employment policy that is, in the estimation of law faculties nationwide, invidiously discriminatory-law schools exercised their expressive and associational rights to enforce their non-discrimination policies even-handedly against military recruiters as they did against any other employer.

4. Congress responded in 1994 by enacting the so-called Solomon Amendment, which requires every institution of higher education to give military recruiters access to campus on pain of losing federal money. The purpose, the sponsors made clear, was to "send a message over the wall of the ivory tower" to "treat our Nation's military with the respect it deserves." 140 Cong. Rec. 11,441 (1994). Both the statute and its execution have become increasingly strict in the intervening years. In its current iteration, as interpreted by the military, the Solomon Amendment co-opts the career services staff, message centers, vehicles of communication, and on-campus interview rooms of a law school, by threatening to cut off virtually all federal funds not just to the law school, but to the entire university of which it is a part-unless the law school suspends its non-discrimination as applied to the military. As of the fall of 2003, for the first time, virtually all law schools in the nation have been forced to accept and support military recruiters on campus, under protest, in violation of the law schools' non-discrimination policies. This is the culmination of an effort that was launched by the Department of Defense ("DOD") in December 2001 and that has been fought and negotiated by law schools

around the country for the last year and a half. Over the summer of 2003, it became clear that virtually every law school in the country had been forced to violate its non-discrimination policy under the threat of the Solomon Amendment.

5. Plaintiffs turn to this Court to vindicate the right of law schools and law professors to choose for themselves, free from government interference, how best to advance their educational missions; what messages to articulate to their communities; and how to communicate those messages. Only this Court can restore the open environment of equality, mutual respect, and dignity that law professors and law students have grown to cherish and expect.

JURISDICTION AND VENUE

6. Subject matter jurisdiction is conferred upon the Court by 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b) and (e).

THE PARTIES

Plaintiffs

Associational Plaintiffs

7. Plaintiff Forum for Academic and Institutional Rights, Inc. ("FAIR") is a membership corporation organized under the laws of the State of New Jersey. FAIR brings this lawsuit on behalf of its members. About half the members of FAIR are law schools. The other half are law school faculties that have voted as a body—by at least majority vote—to join FAIR. The law school faculties that are members of FAIR are the bodies that collectively, and autonomously, make law school policy, including the decision whether and how to implement non-discrimination policies.

a. FAIR's mission is to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education. FAIR members recognize and agree that their non-discrimination policies are central to their missions, for those policies contribute to a setting in which all participants in the dialogue are assured that they will be judged on the quality of their ideas rather than characteristics bearing no relation to merit.

b. Every member of FAIR was promised anonymity as a condition of joining FAIR. This anonymity is critical to the functioning of FAIR. FAIR's members are deeply concerned about being identified publicly, for they fear retribution by government officials and public vilification. Most of FAIR's members fear retribution not just against themselves but against their affiliate institutions within their university communities that rely heavily on government grants and congressional appropriations. They fear specifically that Members of Congress will cancel appropriations to their sister institutions behind closed doors and that Government bureaucrats will reject contracts or grants or will decline to renew them—all without any explanation, but as punishment for what they view as an affront to the military. They also fear that they and their sister institutions will be singled out for virulent and unfair attacks by politicians and in the press, attacks that have already materialized in such mainstream media outlets as the *Wall Street Journal*, *The Legal Times*, and Fox News. Such attacks, unfairly mischaracterizing the lawsuit and the interests of FAIR's members in the lawsuit, expose FAIR's members and their sister institutions to the loss of students, the anger of alumni, and the loss of donations.

c. If FAIR were forced to disclose its membership list publicly, the disclosure would defeat the very organizational purpose that FAIR was created to advance, the highly unpopular advocacy of a dissenting view of a Government policy. In fact, some would-be members of FAIR have declined to join precisely because they have been alerted to Government efforts to learn the identities of FAIR's members and they fear the exposure.

d. There are two exceptions among the membership: Golden Gate University School of Law (Golden Gate Law) and the Faculty of Whittier Law School (Whittier Law). Golden Gate Law is a member of FAIR. Golden Gate Law has a non-discrimination policy that denies the use of its career service office and facilities to discriminatory employers. Golden Gate Law applied this policy to the military as it applied the policy to all employers. In December 2001, Golden Gate Law was one of the two dozen law schools specifically targeted by DOD with a letter raising questions about whether Golden Gate Law was in compliance with the Solomon Amendment, and threatening a complete cut-off of federal funds if Golden Gate Law were found out of compliance. Subsequently, DOD, contrary to clear statutory language, threatened Golden Gate University with the loss of all federal funds, including student financial aid. Because of the threat, and for no other reason, in June 2003, Golden Gate Law suspended its policy with respect to the military, and now admits the military against its will onto its campus to participate in its recruiting job fair. Golden Gate Law believes that the assistance it provides to the military undermines the message it is trying to inculcate in its students and

interferes with the academic environment it has chosen to establish for the benefit of its students and faculty.

e. Whittier Law is a member of FAIR. The Whittier Law faculty voted overwhelmingly in 1989 to endorse a student-sponsored petition to ban military recruiters from on-campus recruitment, because the military did not abide by Whittier Law's statement of nondiscrimination as interpreted by the Whittier Law faculty and the law school's administration. The Whittier Law faculty extended its nondiscrimination policy to all forms of discrimination, including age, disability and sexual orientation. Following the vote, the director of career services promptly disinvited the military JAG representatives and removed all related recruiting materials from the career offices library shelves per this faculty direction. From the fall semester 1989 until the fall semester 2002, Whittier Law adopted the broadest interpretation of its policy to provide law school facilities only to those employers whose practices are consistent with Whittier Law's policy of non-discrimination. Military recruiters were not permitted to post recruiting information, speak at school-sponsored events, sit at tables, access student/alumni addresses, leave material visible in any library area, or interview on campus. If a student expressed interest in a military JAG career, the director of career services would refer the student to a recruiting office.

f. In 1999, when the Solomon Amendment placed Whittier student financial aid at risk, the Whittier Law faculty did not acquiesce, maintaining its resolution and the complete ban on military recruiting. In 2001, Whittier Law was one of the two dozen law schools specifically targeted by DOD with a letter raising questions about whether Whittier Law was in

compliance with the Solomon Amendment, and threatening a complete cutoff of federal funds if Whittier Law were found out of compliance. Whittier Law proposed several compromise plans to on—campus recruiting, including interview access at Whittier College itself.

g. Finally, on June 2002, because of the DOD's threat, counsel to Whittier College notified the military of the Law School's intent to accede to the military's demand for access for recruiting purposes. During the 2002-03 academic year, one May 2003 graduate was accepted to the Air Force JAG. This single offer, the first made since the on-campus interview ban was suspended, does not represent a statistically significant increase in hiring from the Whittier Law School student body. Whittier Law believes that the assistance it provides to the military undermines the message it is trying to inculcate in its students and interferes with the academic environment it has chosen to establish for the benefit of its students and faculty. At least one Whittier Law student believes that if the Law School is to comply with the Solomon Amendment, it should modify the non-discrimination policy to read that the law school should not assist any employer who discriminates "except those deemed worthy of discrimination by the federal government."

h. Every member of FAIR has autonomy to develop policies directed at enhancing its academic atmosphere and safeguarding its ability to recruit and retain diverse students. Every member of FAIR exercised that autonomy to adopt a policy that prohibits discrimination on the basis of, among other categories, sexual orientation. Every member of FAIR requires those employers who seek to use the law schools' career placement offices, facilities and re-

sources to abide by these non-discrimination policies. Every member of FAIR applies these non- discrimination policies to all employers, and has declined to make an exception for military recruiters. As a direct result of the Solomon Amendment, or the DOD's interpretation and application of the Solomon Amendment. every FAIR member has entirely suspended the application of its non-discrimination policy to military recruiters, including any symbolic gestures to signal its adherence to non-discrimination. Every member of FAIR believes that the suspension of its non-discrimination policy has compromised the message of non-discrimination that FAIR members previously sent to their communities and has undermined its efforts to provide its students and faculty with an atmosphere conducive to the free exchange of ideas.

i. Every member of FAIR joined the association pursuant to its customary protocols and policies, with whatever approvals and consultations the dean deemed organizationally necessary.

j. At least two members of FAIR had, for a period of time, barred military recruiters entirely from their campuses, voluntarily foregoing federal funds to the law schools themselves. Both were the targets of threats by the military not just to allow access, but to assist the military in the same ways that they assisted employers who did not discriminate. Both have complied, but only in response to direct threats from the military. One complied because the military threatened to cut off hundreds of millions of dollars in federal funding to the rest of the university. The other complied out of fear of being publicly vilified upon being listed in the Federal Register as non-compliant.

k. Every member of FAIR that did not bar military recruiters from campus found other methods of adhering to its non-discrimination policy as an expression of its stance against discrimination and in vindication of its right not to abet acts of discrimination, even while offering the military full access to its students. Several allowed military recruiters to recruit on campus, but refused to make appointments for them. Some allowed military recruiters to use university space—because their universities had less strict stances on non-discrimination—but not law school space. Most refused to let military recruiters participate in the formal job fairs sponsored by their schools. Each of these FAIR members has abandoned entirely these symbolic stances against discrimination in the face of the Solomon Amendment.

l. At least two of the FAIR members described in Paragraph 7(f), abandoned the practices described only after the military directly threatened them with a university-wide cutoff of all federal funds. Those who abandoned these practices without a direct threat from the military did so because they were aware of the threats directed at others. Every member of FAIR has come to believe over time that the military's position is that it must be treated exactly the same as any employer who does not discriminate, though the military never directly communicated this principle to most of FAIR's members.

m. Among the FAIR members (described in Paragraph 7(e)-(g)) who received direct threats by military personnel, not a single one was given clear directions as to exactly what the Solomon Amendment requires. None was given any formal process by which to

challenge the views of DOD officials that it was out of compliance.

8. Plaintiff The Society of American Law Teachers, Inc. ("SALT") is a New York corporation with almost 900 members. It is the largest membership organization of law faculty in the United States. Its members hail from 159 law schools in 44 states, including New Jersey, the District of Columbia, Puerto Rico and four foreign nations. It is committed to making the legal profession more inclusive and to extending the power of the law to underserved individuals and communities. Its members are law faculty who are ultimately responsible for the stewardship of the law school, and especially for advancing its mission to nurture future leaders and foster an environment conducive to respectful, open dialogue on fundamental issues of law and justice. SALT members consider the non-discrimination policies of their schools to be central to that mission and to their members' roles as law professors. SALT brings the claims in this lawsuit on behalf of its members.

a. The law schools where SALT members teach have implemented non discrimination policies, often times after they were promulgated by SALT members who comprise the faculty of the law schools. These policies prohibit discrimination on the basis of, among other categories, sexual orientation, disability and age. The SALT members and law schools apply these policies to employers who seek to use their career placement office facilities, resources and personnel. In the past, SALT members' law schools applied their non discrimination policies to the branches of the U.S. military that sought to recruit at the law schools.

b. The non-discrimination policies at SALT members' institutions are more than statements of principle. They allow SALT members to pursue scholarly goals and prepare their students for the practice of law in an atmosphere that encourages debate, celebrates diversity and promotes the ideals of respect and tolerance within their communities. The non-discrimination policies forcefully send a vital message of the values embraced by SALT members and SALT members' law schools to students, faculty, staff, and visitors.

c. SALT members are now precluded from enforcing their law schools' non- discrimination policies as they have traditionally done and, for those that were responsible for adopting the policies, as they intended. They cannot apply the policies to military recruiters because of the threat that they and the institutions with which they are affiliated will lose federal funds under the Solomon Amendment. SALT members' law schools would return to applying their non-discrimination policies to military recruiters if the Solomon Amendment were enjoined.

d. In addition, the Solomon Amendment, by forcing law schools at which SALT members teach and work to abandon their non-discrimination policies, interferes directly with the law schools' ability to create an atmosphere that encourages debate, celebrates diversity and promotes the ideals of respect and tolerance, and consequently, with SALT members' ability to benefit from the pedagogical environment that exists because of it.

e. SALT members are both beneficiaries and recipients of the messages of non- discrimination sent by the policies and they are harmed by their respective law schools' suspension of their non-discrimination

policies. They no longer benefit from the pedagogical environments created by the non-discrimination policies. These harms are ongoing and will continue until the Solomon Amendment is enjoined and SALT members' law schools can again apply their non-discrimination policies to military recruiters.

f. As for SALT members who developed, approved, and implemented their schools' non-discrimination policies, and thus were beneficiaries, senders, and recipients of the messages of non-discrimination sent by the policies, they are harmed by their respective law schools' suspension of their non-discrimination policies as they applied to the military because they cannot send or receive the message of non-discrimination free from interference caused by the Solomon Amendment. They too no longer enjoy the pedagogical environment fostered by the non-discrimination policy. These harms are ongoing and will continue until the Solomon Amendment is enjoined and SALT members' law schools can again apply their non-discrimination policies to military recruiters.

9. Plaintiff The Coalition for Equality ("CFE") is an association of students at Boston College Law School. Plaintiff Rutgers Gay and Lesbian Caucus ("RGLC") is an association of students at Rutgers University School of Law. They both are committed to furthering the rights and interests of all groups including gays and lesbians and bring this lawsuit on their members' behalf. Members of both associations are beneficiaries of law school policies directed at increasing diversity and inculcating values and fostering an environment in which respectful debate unfolds. Because of the Solomon Amendment, the rights of CFE's and RGLC's members to receive the educational mess-

ages sent by their respective law schools have been harmed.

Individual Plaintiffs

10. Plaintiffs Pam Nickisher, Leslie Fischer, Ph.D. and Michael Blauschild are students at Rutgers University School of Law (collectively, the "Student Plaintiffs"). Pam Nickisher and Michael Blauschild are residents of New Jersey. Leslie Fischer is a resident of Pennsylvania. As students, they are the beneficiaries of law school policies increasing diversity and directed at inculcating values and fostering an environment in which respectful debate unfolds. Because of the Solomon Amendment, the rights of the Student Plaintiffs to receive the educational messages sent by their law school have been harmed.

11. Plaintiff Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California Law School, and Plaintiff Sylvia Law is the Elizabeth K.. Dollard Professor of Law, Medicine and Psychiatry at NYU Law School (collectively, the "Law Professor Plaintiffs"). As members of their respective law school faculties, the Law Professor Plaintiffs are beneficiaries, senders and recipients of the message of non-discrimination sent by USC's and NYU's non-discrimination policies. They are harmed by their law schools' suspension of their policies as applied to the military because they cannot send or receive the messages of non-discrimination free from interference cause by the Solomon Amendment. This harm is ongoing and will continue until the Solomon Amendment is enjoined.

Defendants

12. Defendant Donald Rumsfeld, the United States Secretary of Defense, heads the DOD, which oversees the United States Armed Forces. The Secretary of Defense is responsible for the formulation and execution of defense policy. DOD is the nation's largest employer, with 1.4 million men and women on active duty, another 1.2 million serving the Reserve and Guard components, and more than 650,000 civilians. DOD also makes available an estimated $1 billion in grants plus billions more in federal contracts every year to institutions of higher education.

13. DOD is responsible for the implementation of the Solomon Amendment. Specifically, DOD makes the ultimate determination whether an institution of higher education is in compliance with the Solomon Amendment. When DoD determines that a school is in violation, it first threatens to cut off grants and contracts to that school. Then, if not satisfied with an institution's compliance, it cuts off those grants and contracts and notifies other agencies that are, in turn, obliged to do the same.

14. Defendant Rod Paige is the United States Secretary of Education. Under his direction, the Department of Education makes available an estimated $3 billion in grants plus millions more in federal contracts every year to institutions of higher education covered by the Solomon Amendment.

15. Defendant Elaine Chao is the United States Secretary of Labor. Under her direction, the Department of Labor ("DOL") makes available monies in the form of grants and federal contracts each year to insti-

tutions of higher education covered by the Solomon Amendment.

16. Defendant Tommy Thompson is the United States Secretary of Health and Human Services. Under his direction, the Department of Health and Human Services ("HHS") makes available an estimated $12 billion in grants plus millions more in federal contracts every year to institutions of higher education covered by the Solomon Amendment.

17. Defendant Norman Mineta is the United States Secretary of Transportation. Under his direction, the Department of Transportation ("DOT") makes available monies in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

18. Defendant Tom Ridge is the United States Secretary of Homeland Security. Under his direction, the Department of Homeland Security makes available monies in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

FACTS

Law School Mission

19. Law schools are not merely vocational schools that churn out lawyers so that they can pass bar exams, draft briefs and close deals. Law schools aspire to train the next generation of leaders to pursue justice, respect the rule of law, and stand by principle.

20. Law schools have determined that diversity in their faculty and students is an essential precondition to this mission, both because the society these future lawyers will enter, and hopefully lead, is not monochroma-

tic, and because discourse is richer in communities full of varied backgrounds, perspectives, and experiences.

21. Diversity serves no purpose if students and faculty feel inhibited from engaging in discourse. Thus, law schools have promoted, demanded, and strictly enforced, not merely diversity, but also tolerance and respect. Law schools nurture environments in which students are welcome to present their views, their ideas, and beliefs. Key to this environment, and key to their mission, therefore, is an uncompromising adherence to the principle that all who engage in discourse within the law school community are fully equal. Judgments based solely on race, creed, color, religion, gender, national origin, or sexual orientation have no place in the law school environment. They have no place because they undermine the law school's mission.

Non-Discrimination Policies

22. The message of diversity and tolerance is communicated by law schools through their faculty, their curriculum, and their policies. Almost every accredited American law school has adopted a non-discrimination policy. The words may vary but the content and the message communicated is the same:

> [The] Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, or sexual orientation.

23. Law schools admit students, grant scholarships, grade exams, recruit and promote faculty, and hire staff in light of these principles. In furtherance of the policies, law schools also follow recruiting policies:

They refuse to assist any recruiter who discriminates on the basis of characteristics unrelated to merit. Some have refused even to allow such recruiters on campus to recruit.

24. In so doing, the school conveys a message that law school personnel will not abet the discriminating employer's recruiting efforts. To do otherwise is antithetical to both the law schools' message and mission. This policy has substantive pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures, values that law faculty hope students will internalize, and the policy reifies those values, modeling behavior that it hopes its students will follow in their law practices and lives as community leaders.

25. In the law school's judgment, this policy also helps nurture the sort of environment for free and open discourse that is the hallmark of the academy.

26. Law schools apply this policy even-handedly to all employers. Any employer who discriminates forfeits law school assistance in recruiting and might even be excluded from recruiting on campus. Students are free to seek jobs with employers that discriminate. However, they must do so without the law school's active support of that employer, and at times must do so without the law school's active support of that employer, and at times must do so off campus.

27. Because law schools applied their non-discrimination policies even-handedly, no exception was made for the military and its discriminatory policy regarding sexual orientation. Their motive has been neither to punish the military nor to undermine military recruitment. They sought to adhere to a principle that has

long motivated the academy and to maintain the open, respectful academic environment they aspire to nurture.

The Solomon Amendment

28. In 1995, Congress responded to the non-discrimination policies of educational institutions by passing the Solomon Amendment, named for its sponsor, Representative Gerald Solomon of New York. Among the purposes of the amendment, according to a congressional supporter of the legislation, was to "send a message over the wall of the ivory tower of higher education." 140 Cong. Rec. 11,441 (1994). The amendment, which has become increasingly strict over the years in language and interpretation, currently covers funds allocated in two broad appropriations measures—one for the Departments of Defense and Transportation, and the other embracing the Departments of Labor, Health and Human Services, and Education, and related agencies. In its current incarnation, the Solomon Amendment provides that none of the funds in those two appropriations measures:

> may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents
>
> (1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students. . . on campuses, for purposes of military recruiting; or

> (2) access by military recruiters for purposes of military recruiting to. . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution) . . .

10 U.S.C. § 983(b). The Solomon Amendment also now applies to funds from the Department of Homeland Security. Pub. L. No. 107-296, Title XVII, § 1704(b)(I),(g), Nov. 25, 2002, 116 Stat. 2314, 2316.

29. The statute and implementing regulations effectively make the funding restriction provisions of the Solomon Amendment applicable only to those law schools that ban or restrict the military from recruiting as an expression of protest of the military's discriminatory hiring practices. Schools that ban the military from recruiting for other reasons are not subject to the provisions of the Solomon Amendment.

30. Under the terms of the Solomon Amendment, the funding prohibition is triggered only when an institution has a policy or practice that "prohibits, or in effect prevents" military recruiters from "gaining entry to campuses or access to students . . . on campuses" or access to "information pertaining to students." 10 U.S.C. § 983(b). DOD regulations promulgated under the statute exempt some schools that do not "provid[e] requested access" so long as they can demonstrate "that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers." 32 C.F.R. § 216.4(c)(3).

31. The Solomon Amendment authorizes the Secretary of Defense to issue regulations prescribing procedures for determining whether an educational institution has a policy of denying or preventing access to students on campus or to information. According to

DOD, once it determines that an institution has violated the Solomon Amendment, the institution is no longer eligible for most funds administered by the Departments of Defense, Transportation, Labor, Health and Human Services, Education, Homeland Security, and related agencies. 10 U.S.C. § 983(d)(2).

32. In implementing the regulations, the DOD has taken inconsistent positions, and its current position is internally contradictory, particularly in regard to the statutory language about "subelements." DOD initially read the language to mean that only the sub element of a school that violated the Solomon Amendment would be punished. 63 Fed. Reg. 56,819 (Mar. 29, 1997). Without notice or comment, however, DOD amended its regulations to eliminate the subelement limitation from regulations governing its own funds, 65 Fed. Reg. 2056 (Jan. 13, 2000), but kept it in place as applied to the funds of other agencies, *see* 32 C.F.R § 216.

33. Under DOD's current reading of the law, upon its determination that any subelement of an institution of higher education is in violation of the Solomon Amendment, the Defendants are all required to stop payment on virtually all of their grants and contracts to the entire school and to award them no further grants or contracts.

Efforts to Comply With the Solomon Amendment

34. Virtually none of the law schools in the nation have barred military recruiters from campus although a handful have. What many did, however, was to develop devices to adhere to their non-discrimination policies even while ensuring full military access to interested students. Some did not let law school personnel arrange student interviews, but relegated the task to

career services professionals from somewhere else at the university. Others would allow military recruiters on campus by invitation of any student or student group-and would make facilities available to them-but would not match students to recruiters or post military literature.

35. The military was still inundated with many more highly talented lawyers than it could accommodate. As one recruiter remarked, "Competition has been very keen in the past few years for both our intern and JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position."

36. Lately, however, DOD, or officers of various branches of the military, has begun threatening law schools with a cutoff of federal funds for alleged violations of the Solomon Amendment. And the military has demanded more than just access. It has demanded the law schools' active participation in military recruiting. Typically, the military has communicated the demand not by specifying what the law school has done wrong. Rather, the military merely has declared that the law school is in default and that all federal funds will be cut off if the law school does not come into compliance.

37. Some law schools responded by requesting from DOD a clear statement of what it believes the law requires. DOD has consistently refused to offer concrete guidance, replying only that the inquiring school remains in default.

38. When law schools asked the complaining military officials how they could obtain review of their recruiting policies without risking suspension of federal

monies, the typical response was that there was no review. In other words, the military officials claimed that the law school had to risk losing all of its federal monies before it could obtain DOD review. Review could be had only once the military determined that the law school was out of compliance, DOD recommended the suspension of funds, and funds were suspended.

39. The recruiting policies of law schools have no discernable impact on the military's ability to recruit, as the military was more than able to meet its JAG Corps recruiting needs before law schools began to suspend their non-discrimination policies. A law school's decision not to volunteer law school staff to help the military recruit is therefore entirely expressive in purpose and effect.

40. After nearly 18 months of exchanges between the military and various law schools, and in direct response to the threats of the military, as of the 2003 fall recruiting season, every law school in the nation that receives federal funds has permanently suspended the application of its non-discrimination recruiting policy to the military. As a result, law schools' statements of dissent and protest are being suppressed, and law schools are being forced to endorse, or appear to endorse, the military's discriminatory hiring policy-a message that is repugnant to them.

41. The injury to law schools, law faculties, and law students is constant and irreparable. Most law schools host employers officially in the fall and the spring, but their efforts on behalf of employers are perpetual. Before the last employer leaves campus in the fall, law school career services personnel begin to collect and disseminate the literature of employers who will be arriving in the late winter and early spring. In order to

accommodate the military's demands for a spring recruiting cycle, law school personnel must begin making arrangements and organizing appointments far in advance. Thus, even as one recruiting season ends, the next begins, and the military's insistence on parity with non-discriminating employers means that throughout the year, it is demanding that law schools perform functions that the law schools would refuse to perform but for the threat of the Solomon Amendment.

CAUSES OF ACTION

Count I: Statutory Construction

42. The allegations of ¶¶1-39 of this Complaint are incorporated and re-pled.

43. The Defendants have misread and misapplied the plain terms of the Solomon Amendment and the regulations promulgated thereunder: (A) by demanding that law schools do more than permit "entry to campuses, or access to students . . . on campuses, for the purposes of military recruiting;" (B) by incorrectly interpreting the statute and the regulations to require that a law school offer military recruiters every service and accommodation given to employers who satisfy the law school's non-discrimination policy; and (C) by interpreting the Solomon Amendment to permit a university-wide funding freeze just because of a law school's purported non-compliance.

44. As a result of the military's misreading and misapplication of the Solomon Amendment and its implementing regulations, the Plaintiffs and their members have been and continue to be irreparably harmed.

Count II: Unconstitutional Conditions

45. The allegations of ¶¶ 1-42 of this Complaint are incorporated and re-pled.

46. The Solomon Amendment and regulations promulgated thereunder violate the rights of Plaintiffs (and/or of Plaintiffs' members) under the First Amendment to the Constitution of the United States, by imposing an unconstitutional condition on the receipt of federal funding, thereby impinging on Plaintiffs' academic freedom, freedom of speech, and freedom to associate with one another in pursuit of common objectives.

Count III: Viewpoint Discrimination

47. The allegations of ¶¶ 1-44 of this Complaint are incorporated and re-pled.

48. The Solomon Amendment, as written and implemented, constitutes impermissible viewpoint discrimination in violation of the First Amendment to the Constitution of the United States in that its funding restrictions apply only to law schools and other institutions that ban or restrict military recruiters in protest. Law schools and other institutions that exclude military recruiters for other reasons are not affected by the Solomon Amendment's funding restriction provisions.

49. Because the Solomon Amendment is viewpoint-based, it is presumptively unconstitutional and the military cannot rebut this presumption. The constitutional rights of Plaintiffs (and/or Plaintiffs' members) therefore have been, and continue to be, irreparably harmed.

Count IV: Compelled Speech/Suppressed Dissent

50. The allegations of ¶¶ 1-47 of this Complaint are incorporated and re-pled.

51. The Solomon Amendment impermissibly prohibits the Plaintiffs (and/or Plaintiffs' members) from expressing dissent by cutting off critical federal funding to law schools that express their protest of and objection to the military's discriminatory hiring and personnel policies and by exposing allegedly non-compliant schools to public censure by identifying them in the Federal Register. The Solomon Amendment forces the Plaintiffs (and/or Plaintiffs' members) to express and subsidize a message of support for military, even though they abhor the military's discriminatory hiring decisions.

52. The constitutional rights of Plaintiffs (and/or of Plaintiffs' members) to express dissent and to be free from compelled endorsement of messages repugnant to them therefore have been, and continue to be, irreparably harmed.

Count V: Void for Vagueness/Overbreadth

53. The allegations of ¶¶ 1-50 of this Complaint are incorporated and re-pled.

54. The Solomon Amendment is unconstitutionally vague and/or overbroad and thus void under the First Amendment and the Due Process Clause of the Fifth Amendment of the Constitution of the- United States, in that it restricts a wide range of speech and associational activities protected under the First Amendment, lacks sufficient definitions or guidance regarding its application, grants unfettered discretion to DOD and low-level military officers to decide what constitutes compliance, and impermissibly chills the speech of Plaintiffs (and/or Plaintiffs' members).

55. The operative language of the statute and its implementing regulations are so vague that persons of

common intelligence must necessarily guess at their meaning and differ as to their application. Moreover, the DOD, as the enforcing agency, has not only refused to clarify its interpretation of the statute or the regulations, but, through various recruiters and officers, also has given numerous conflicting interpretations to the statute and regulations. As a result, the constitutional rights of Plaintiffs (and/or Plaintiffs' members) have been, and continue to be, irreparably harmed.

Count VI: Due Process

56. The allegations of ¶¶ 1-53 of this Complaint are incorporated and re-pled.

57. The Defendants, by refusing to provide the university or the law school with the reason or reasons that the university is in violation of the Solomon Amendment, and by finding the university in violation without giving the university an opportunity to be heard, have violated the Plaintiffs' (and/or Plaintiffs' members') right to due process under the Fifth Amendment to the United States Constitution.

Count VII: Violations of the Administrative Procedure Act

58. The allegations of ¶¶ 1-55 of this Complaint are incorporated and re-pled.

59. The DOD's elimination of the subelement limitation from the regulations governing its own funds without notice or comment period violated the provisions of the Administrative Procedure Act. 5 U.S.C. § 551, et. seq.

60. The DOD's failure to provide law schools with reasoned and supported explanations of how the law schools allegedly had failed to comply with the Solomon

Amendment violated the Administrative Procedure Act. 5 U.S.C. § 551, et seq.

61. The DOD's violations of the Administrative Procedure Act have caused and continue to cause irreparable harm to the Plaintiffs (and/or Plaintiffs' members).

* * * * *

62. The Plaintiffs have no adequate remedy at law for any of these violations.

* * * * *

WHEREFORE, Plaintiffs respectfully request the Court to:

(1) Declare pursuant to 28 U.S.C. § 2201 that, as a matter of statutory construction, law schools have no obligation under the Solomon Amendment to do anything other than allow military recruiters to enter the campus in order to recruit, without expecting any support or other involvement from the law school;

(2) Declare pursuant to 28 U.S.C § 2201 that the Solomon Amendment—even when limited to a directive to allow the military on campus to recruit—violates the First an Fifth Amendments to the Constitution of the United States;

(3) Declare pursuant to 28 U.S.C. § 2201 that the Defendants have violated the provisions of the Administrative Procedures Act in their interpretation and implementation of the Solomon Amendment;

(4) Grant appropriate preliminary, and final, equitable relief enjoining the Defendants from enforcing the Solomon Amendment, including but not limited to, declaring law schools ineligible for federal grants or contracts, recommending ineligibility to the Principal Deputy Under Secretary of Defense for Personnel

Readiness or any other DOD official, listing schools in the Federal Register as institutions that are not in compliance with the Solomon Amendment, or notifying any of the other Defendants or any related federal agency of such ineligibility for the purposes of terminating grants or contracts under the Solomon Amendment;

(5) Award reasonable attorneys fees and costs pursuant to 28 U.S.C. § 2412; and

(6) Grant such other and further relief as the Court deems proper.

Dated: October 14, 2003 Respectfully submitted,

/s/ E. JOSHUA ROSENKRANZ
E. JOSHUA ROSENKRANZ
(ER6734)
Timothy P. Wei (TW1134)
Sharon E. Frase (SF4906)
HELLER EHRMAN WHITE
& McAULIFFE LLP
120 West 45th Street
New York, NY 10036
Telephone: (212) 832-8300

Warrington S. Parker, III
(WP3514)
Aaron M. Armstrong (AAI123)
HELLER EHRMAN WHITE
& McAULIFFE LLP
333 Bush Street
San Francisco, California
94104-2878
Telephone: (415) 772-6000

EXCERPTS OF APPLETON AND TOKARZ DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICA LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF SUSAN APPLETON AND KAREN TOKARZ

I, Susan Appleton, declare pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Lemma Barkeloo and Phoebe Couzins Professor of Law and former Associate Dean of Faculty at Washington University School of Law. I have taught at Washington University School of Law since 1975 and served as the Associate Dean of Faculty from 1998 until 2003. If called as a witness, I could and would testify to the following based on personal knowledge or on information and belief.

I, Karen Tokarz, declare pursuant to 28 U.S.C. § 1746, as follows:

2. I am a Professor of Law and the Director of Clinical Education at Washington University School of Law. I have taught at Washington University School of Law since 1979 and have been the Director of Clinical

Education since 1980. If called as a witness, I could and would testify to the following based on personal knowledge or on information and belief.

We, Susan Appleton and Karen Tokarz, declare pursuant to 28 U.S.C. § 1746, as follows:

3. Washington University School of Law has a long-standing commitment to diversity and nondiscrimination, dating back to the earliest days of the school. In 1869, only two years after opening its doors, the School admitted its first woman student. Washington University is believed to be the first law school (certainly among the first law schools) in the nation to admit women students. The School admitted its first student of color in 1883. In the early 1970's, explicit affirmative action programs designed to recruit and retain underrepresented minorities, primarily African-Americans but also underprivileged whites, enhanced the diversity of the student body. Even before federal legislation required equal access, students with disabilities were admitted to the School of Law, including students with visual impairments and hearing impairments as well as those requiring the assistance of wheelchairs.

Diversity, tolerance, and respect are hallmarks of the Washington University School of Law community. * * *.

4. Both Washington University and the School of Law expressly endorse and communicate their policies of non-discrimination. Both policies include sexual orientation as a prohibited basis for discrimination. The published University policy reads:

> Washington University encourages and gives full consideration to all applicants for admission, financial aid, and employment. The University does not

> discriminate in access to, or treatment or employment in, its programs and activities on the basis of race, color, age, religion, sex, *sexual orientation*, national origin, veteran status, or disability.

See Exhibit 1.

5. The School of Law Faculty Rules were amended in May 1990 to add sexual orientation, religion, national origin and age to prior explicitly prohibited classifications of race, sex, and handicap, in order to conform this policy to the broad non-discrimination provisions published in the School of Law Admissions literature.

> Faculty are prohibited from discriminating against students on grounds of race, color, religion, national origin, sex, handicap or disability, age, or *sexual orientation* (Faculty Rule (K) 1).

See Exhibit 2.

6. Per the Faculty Rules, the School of Law Career Services Office since May 1990 has required all prospective employers seeking to use the Career Services Office facilities to sign a written assurance of non-discrimination and the School has applied this policy even-handedly to all employers. The policy does not prevent discriminatory employers from contacting students, nor is the goal to dissuade students from seeking jobs with those employers. Rather, the goal is expressive—to communicate to students, faculty, and staff that the School will treat all students equally and will not compromise on its non-discrimination policy. The School of Law policy reads:

> Washington University School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this

> school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or *sexual orientation.* For purposes of this rule, the posting of employment notices on any bulletin boards designated for official law school business, or the posting or distribution of such notices by the law school administration elsewhere in the law school building, shall be considered making Career Services facilities available. Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy (Faculty Rule (K) 3).

See Exhibit 3.

7. In 1990, the Association of American Law Schools required its member schools to insist that employers who seek to use a law school's career services offices provide written assurance that they will not discriminate against student applicants based upon sexual orientation or any other protected category. In 1995, Congress enacted the Solomon Amendment, denying Department of Defense funding to institutions of higher education that prevented the military from recruiting on campus. In 1997, Congress extended the rule denying federal funds to universities and sub-elements of universities that denied access to military recruiters to grants and contracts provided by the Departments of Labor, Health and Human Services, Education, and Transportation.

8. From 1990 to 1997, the Washington University School of Law did not allow any employers who refused to sign the non-discrimination assurance use of the Career Services Office facilities. When a military re-

cruiter signed the required assurance of non-discrimination, as the U.S. Army did prior to 1997, such recruiters were allowed to use the School of Law Career Services Office facilities. From 1996 to 2001, in response to the enactment of the Solomon Amendment, the School of Law Career Services Office allowed military recruiters who refused to sign the assurance (but not other employers who did not sign) to send out e-mail on the student list serve. The ROTC Department scheduled interviews on campus at the ROTC Building.

9. On January 13, 2000, the Department of Defense adopted interim regulations, effective immediately, to define an institution of higher education to include all sub-elements of such an institution, thus eliminating the pre-existing policy that treated schools and colleges within a university as independent actors for purposes of determining whether financial sanctions would be applied to universities at which one school or college excluded military recruiters.

10. In September 2000, the School of Law Career Services Office received letters and/or calls from U.S. Army, Navy, and Air Force recruiting officers stating their interest in recruiting Washington University law students at the School of Law, not at the ROTC Building. The Career Services Office initially responded that it preferred to continue the past practice of using the ROTC Building. The representatives of the military advised they would report the School to their superiors for violating the Solomon Amendment and represented that failure to comply with their requests would place Washington University federal grants and other funding at risk.

11. In response to these new demands from the military and the conflict with the School of Law's ex-

plicit non-discrimination policy, Joel Seligman, Dean of the School of Law, held an open forum on October 25, 2000 for faculty, students and staff. A large number of students and faculty, before and at that meeting, expressed deep concerns about the possible suspension of the School of Law's non-discrimination policy for military employers only.

12. On November 7, 2000, Mark S. Wrighton, Chancellor of Washington University, instructed the Law School to allow the military access to Career Services Office on-campus recruiting facilities. Chancellor Wrighton requested that the School of Law "except the Department of Defense's military recruiting programs from [the School of Law] policy of having to affirm that they do not discriminate on the basis of sexual orientation." He acknowledged that "[t]his action . . . will cause pain among members of the gay and lesbian community."

See Exhibit 4.

13. On November 8, 2000, Joel Seligman, the Dean of the School of Law, advised faculty, students, and staff that the School of Law would allow military recruiters access to the facilities of the Career Services Office, "while this [DOD interim] regulation remains in effect . . . because of the extraordinary impact a prohibition of recruitment would have on other schools throughout our University." He said, "For many of us, a policy of non-discrimination on the basis of sexual orientation reflects a fundamental moral value," and he acknowledged "how much pain will result from this action."

See Exhibit 5.

14. On November 8, 2000, 45 members of the Law School Faculty and Administration signed an open

letter endorsing the University and School of Law non-discrimination policies and expressing concerns about the impending suspension of the policy for the military, an employer which openly discriminates against gays and lesbian student applicants. The Faculty Statement reads:

> The undersigned members of the faculty and administration of Washington University School of Law write to reaffirm our support for the University and School of Law policies prohibiting discrimination based on sexual orientation and the School of Law policy barring discriminatory recruiters. We also wish to share our concerns regarding the temporary suspension of the policy as to military recruiters. We deplore the military policy that requires this suspension. *It compromises our longstanding conception of the academic freedom of a faculty of law to determine appropriate ethical standards for the recruitment of our students and conscripts us into complicity with policies that unjustly degrade fellow persons* [emphasis added]. All our collective experience with struggles for elementary justice under law suggests now, as much as ever, our ethical need to resist familiar attempts to divide people of good will from a sense of their common humanity.

See Exhibit 6.

15. On November 8, 2000, OUTLAW (the School of Law LGBT student organization) sent a letter to the Faculty and the Administration questioning the institution's commitment to non- discrimination when it allows exceptions to the non-discrimination policy, and expressing concern that such action conveys "school-

sanctioned prejudice" against gay, lesbian, bisexual, and transgendered students. The letter reads, in part:

> The law school should not yield in its goal of attaining a nurturing educational environment where all members of our community are treated equally without fear of persecution . . . As the representatives of law and justice on this campus, the School of Law has a unique duty and opportunity to uphold the policy it has adopted with regard to discriminatory hiring practices. *The reasoning is clear: an unenforced policy is not a policy.* The words of the policy on discrimination embody strong principles that are highly valued by the Washington University School of Law community. *A failure to enforce these principles reduces the policy to mere rhetoric.*
>
> If we do not stand by our position, we send the message that, although the school has knowingly admitted gay, lesbian, bisexual and transgendered students, these groups have no protection here. This means they cannot enjoy the same benefits as other students and are subject to school-sanctioned prejudice.
>
> Lawyers, historically the protectors of civil liberties, have a special obligation to uphold the principles of equality. This decisions offers [the School of Law] an opportunity to remain consistent with the promise made to us when we came to Washington University, that "we do not discriminate here, nor do we tolerate those who do."

See Exhibit 7.

* * * * *

17. On February 23, 2001, for the first time in over 10 years, Washington University School of Law suspended its non-discrimination policy and permitted access to the facilities of the Law School Career Services Office to an employer who refused to sign the non-discrimination assurance. The U.S. Army, Air Force, and Navy sent representatives to conduct interviews in the Law School building, as part of the Career Service Office's spring on campus interview program.

18. At the time of that visit (and subsequent visits) the Law School posted ameliorative statements outside the Career Services Office advising that the military had not signed the non-discrimination assurance that the Law School requires of all employers using its services. The ameliorative statement also was posted at the doorways to the building and outside the interview rooms. Since then, each time that the military recruiters visit campus or post job information, the Law School posts such ameliorative statements.

See Exhibit 9.

19. At the time of that first visit (and subsequent visits), many oppositional posters were hung by students and faculty throughout the building and a large protest was held at which students, faculty, and administrators participated. Following the protest a video was created of the protest. Copies of these posters are attached at Exhibit 10.

20. At that first recruiting session on February 23, 2001, some student protestors who opposed the military's presence on campus signed up for and attended interviews. Some gay students who desired to work for the Department of Defense also signed up for and

attended interviews. Kevin Linder, WU '01, a former ROTC student at Princeton who has wanted to be an officer in the JAG Corps since high school, interviewed and admitted to the recruiter that he was gay. At the protest, Linder said that the recruiter advised him that he (Linder) was ineligible due to his sexual orientation. Linder told the audience,

> [Even though I am now out about my sexuality,] I am the same person. I still want to be an officer. I still want to be an attorney. I still want to be a JAG Corps attorney. . . . I really, really felt the sting of overt discrimination aimed at me. When JAG was invited, when they forced themselves on campus, I felt that it was offensive. And I didn't really think that they should be able to come here without a fight.

21. Thomas J. Hill, WU '03, President of OUTLAW, also spoke (and cried) at the February 23, 2001 protest. He said, "I came to this school pursuing a dream of equality and justice and what that meant in our society. I thought I'd be fighting for the other person. Now, I find myself fighting the fight firsthand. Unfortunately, here and now my dignity has been jeopardized."

22. Ebony Woods, WU '03, President of BLSA, also spoke at the February 2001 protest, as did Professor Kimberly Norwood. Norwood said, "It is unbelievable that we are allowing these people into our home, into our place of justice. It is particularly painful for me because the very reason that the military gives for discriminating is the very reason that they used decades ago to keep African-Americans out."

23. Patavee Vanadilok, WU '01, President of the Student Bar Association, also spoke at the February 23,

2001 protest. She bemoaned that students have come to believe that the School is not in fact committed to non-discrimination and that hate speech and other forms of discrimination against gay and lesbian students and faculty will be tolerated by the School of Law. She said, "[T]he dark side of this community has been unleashed [in recent weeks]. It is because blatant and open forms of prejudice and hostility exist at the WU School of Law that we should support this vigil and protest against the suspension of this school's non-discrimination policy."

24. In Fall 2001, Spring 2002, Fall 2002, and Spring 2003, the U.S. military conducted interviews through the Career Services Office, although the School required that the interviews be conducted outside the Law School in an adjoining building which some other employers also used.

25. Further protests/vigils have been held on each occasion of visits by military recruiters (but for Fall 2001, due to events of September 11, 2001) featuring nationally prominent speakers such as Professor Sylvia Law (NYU), Professor Chai Feldblum (Georgetown), and Professor Aaron Belkin (University of California, Santa Barbara).

26. The Faculty Statement has been republished each year, most recently in March 2003, as the Law School has been forced to suspend its non-discrimination policy and permit military recruiters to use the Career Services facilities to recruit law students on campus, in

response to the University's continuing concern that the Department of Defense will interfere with the entire University's federal funds.

* * * * *

EXHIBIT 5 TO APPLETON & TOKARZ DECLARATION

Memo From the Dean

MEMO FROM THE DEAN

To: Faculty, Students, and Staff

From: Joel Seligman

Date: November 8, 2000

Subject: Military Recruiters on Campus

This academic year, for the first time since this School adopted a policy prohibiting discrimination based on sexual orientation, an employer who openly discriminates against gay and lesbian people will be allowed access to the facilities of the School of Law's Career Services Office.

Both our University and the School of Law have adopted a policy of nondiscrimination on the basis of sexual orientation. The School of Law policy, which specifically applies to Career Services and which will otherwise remain in effect states that these facilities "shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation." Our policy further states that employers who wish to use the Career Services Office are required to sign a statement certifying that their practices conform to our policy. The United States military currently discriminates in its hiring and employment on the basis of sexual orientation. As a result we have not allowed the military to use the Career Services

facilities to recruit our law students. In recent years, the Army JAG Corps has used our public lists serve to invite students to interview with them at the campus ROTC building.

Earlier this year, the Department of Defense adopted an interim regulation which removed the "unit exception" from the application of the Solomon Amendment. The Solomon Amendment was enacted by Congress in 1995 to withhold specified federal funds from law schools that denied military recruiters access to their campuses. The removal of the "unit exception" means that our law school's continued refusal to allow military recruiters to use the Career Service Office would place in jeopardy federal grants to other schools throughout our University, including grants from Health and Human Services, but not including student financial assistance.

After discussion with Chancellor Mark Wrighton it is clear that the law school will not be able to enforce its nondiscrimination policy against the military while this regulation remains in effect. Our School, like virtually every other law school in this country, will be required to permit the military to recruit while the Department of Defense Regulation remains in effect.

It is also clear, after meeting with interested students and faculty on Wednesday, October 25; reviewing the results of a student referendum; and receiving a large number of communications on the subject, how much pain will result from this action. For many of us, a policy of nondiscrimination on the basis of sexual orientation reflects a fundamental moral value.

The decision to permit military recruitment does not reduce our faculty's administrators, or students com-

mitment to the goal of nondiscrimination on the basis of sexual orientation. This School will continue to support reasonable ameliorative efforts to signify our commitment to this goal.

The decision, nonetheless, to permit military recruiters on campus is necessary because of the extraordinary impact a prohibition of recruitment would have on other schools throughout our University. It trivializes this impact to say that this is just about money. At issue potentially are careers, the education of students, residents, interns, and fellows; patient care; and potentially cures to devastating diseases.

The Association of American Law Schools (AALS) Accreditation Standards require that this School of Law take steps to ameliorate the damage to those protected by our nondiscrimination policy. I will request that the Career Services Office place notices recognizing that the military recruitment practices are inconsistent with our School's nondiscrimination policy. The School of Law is attempting to organize a meeting with Professor Sylvia Law of New York University Law School in January 2001 to discuss why the military policy is wrong and national efforts at amelioration.

The AALS, joined by other educational organizations, has submitted comments to the Department of Defense arguing that the interim regulations are illegal. These regulations were adopted on an emergency basis without complying with the Administrative Procedure Act, which ordinarily requires federal agencies to provide notice of proposed rulemaking and an opportunity for public comments and a statement of the basis and purpose for the rule. Second, the language of the committee reports concerning the current Department of Defense appropriation may not provide an

adequate basis for the Regulation's revision of the long accepted understanding of the earlier Solomon Act. This School of Law will explore with others in American legal education whether the new regulations might be challenged as illegal and how the School of law might contribute to such an effort.

EXHIBIT 7 TO APPLETON AND TOKARZ DECLARATION

TO: The Faculty of The School of Law
FROM: OUTLAW
RE: Military Recruiters on Campus
DATE: November 8, 2000

More than ten years ago, this law school's faculty adopted a policy of non-discrimination based on sexual orientation. Ironically, when the need for this non-discrimination policy finally arises, our community may abandon it in favor of the discriminatory hiring practices of the United States Military. The threat is asserted under penalty of losing a considerable amount of Federal funding to the School of Medicine. We are being asked to abandon our policy on discrimination in the School of Law in favor of the monetary gain to Washington University. The law school should not yield in its goal of attaining a nurturing education environment where all members of our community are treated equally without fear of persecution. The law school, as a proactive force advocating against discrimination, should not permit military recruiters' use of law school facilities to promote policies which discriminate against sexual minorities. OUTLAW is asking that our law school community persevere in its activism and challenge the continuing invidious discrimination against minorities.

Despite the universal Policy on Discrimination shared by all departments and programs at Washington University, military recruiters are still permitted to engage in discriminatory recruiting activities on this campus. As the representatives of law and justice on

this campus, the School of Law has a unique duty and opportunity to uphold the policy it has adopted with regard to discriminatory hiring practices. The reasoning is clear: an unenforced policy is not a policy. The words of the Policy on Discrimination embody strong principles that are highly valued by the Washington University community. A failure to enforce these principles reduces the policy mere rhetoric. In order to give meaning to the Policy on Discrimination, the military must not be allowed to reassert its discriminatory policies on our campus. Because the main purpose of our non-discrimination policy as it effects the law school community concerns employment recruiting, if we do not oppose the use of our facility for military recruiting, our actions effectively negate the "sexual orientation" clause of the non-discrimination policy altogether. As members of the legal community, we should understand the negative effect that failure to uphold this policy would have on our community at large.

In the interest of further distinguishing Washington University School of Law as a progressive and leading law school, it is now time to take a stand. * * *.

If we do not stand by our position, we send the message that, although the school has knowingly admitted gay, lesbian, bisexual and transgendered students, these groups have no protection here. This means they cannot enjoy the same benefits as other students and are subject to school-sanctioned prejudice. The law school has two options: welcome gay students and ensure their equality on campus, or inform them of their unfair treatment they can expect at Washington University.

OUTLAW believes that the law school cannot afford to compromise on this critical issue, even at great cost

to the University. Although the ultimate choice of disallowing military recruiting in our building lies with Chancellor of the University, a decision by the law school to exclude military recruiters from our facilities would send a clear message to the University community and the public at large. This decision would be an unequivocal declaration that the military's hiring practices are inappropriate and unjust. Lawyers, historically the protectors of civil liberties, have a special obligation to uphold the principles of equality. This decision offers an opportunity to remain consistent with the promise made to us when we came to this school that, "we do not discriminate here, nor do we tolerate those that do." This message, from a respected body of learning, might lead legislators to see that the ideology supporting discriminatory policies is unacceptable.

OUTLAW, therefore, asks for your vote in upholding our current Policy on Discrimination. We require more than the "ameliorative measures" prescribed by AALS in reconciling this injustice because they fail to address our deepest concern. In order to ensure continued equality for all students at Washington University, OUTLAW suggests that we unite and continue to prohibit military recruiting in the law school. The spirit of the law and the principles of justice are simply to valuable to sacrifice in the name of bureaucracy or money.

EXHIBIT 8 TO APPELTON & TOKARZ DECLARATION

STUDENT BAR ASSOCIATION'S (SBA) RESOLUTION

In a special Session on Wednesday, February 21, 2001, the Student Bar Association passed the following Resolution by a vote of 20 in favor, 3 in opposition and 0 abstentions:

WHEREAS
the Student Bar Association is both a representative body entrusted with the responsibility to enact the will of its constituents and a group of student leaders with a duty to uphold the values of the greater Washington University School of Law Community;

WHEREAS
Washington University School of Law has enacted, supported, and believes in a Non-Discrimination Policy that expressly prohibits discrimination based on gender or sexual orientation;

WHEREAS
the United States Department of Defense has enacted, supported, and believes in a hiring policy that blatantly discriminates based on gender and sexual orientation;

WHEREAS
Washington University School of Law has therefore historically barred United States Military Recruiters from recruiting law students within its walls;

WHEREAS
the United States Department of Defense therefore has improperly issued an interim regulation under the

authority of the Solomon Amendment, forcing Washington University School of Law, as well as all other American Association of Law Schools accredited law schools, to suspend its Non-Discrimination Policy, allowing Military recruitment within its walls;

WHEREAS
the United States Department of Defense's insistence on the practice of discrimination at Washington University School of Law is invidious, and perpetuates both ignorance and injustice at a time when the Nation formally and generally has repudiated prejudice and bias as the bases of social policy;

WHEREAS
the entire Washington University School of Law Community is undeniably adversely affected, pained, and outraged at being hindered in the pursuit of education, forced to compromise its principles in the face of economic threat, and further forced to suffer discrimination based on gender and sexual orientation;

WHEREAS
the Faculty and Administration of Washington University School of Law believe that the students should express their concern that a wise Non-Discrimination Policy is so suspended, and therefore support the ameliorative actions prescribed by the American Association of Law Schools, and further propose ameliorative efforts based upon the suggestions of concerned students;

THEREFORE,
be it resolved by the Student Bar Association, that we do hereby clearly, undeniably, and unequivocally resist, oppose and are outraged by the suspension of the

Washington University School of Law Non-Discrimination Policy;

THEREFORE,
be it further resolved by the Student Bar Association, that we hereby clearly, undeniably, and unequivocally support and subscribe to the ameliorative efforts proposed by the Faculty and Administration of Washington University School of Law based upon the suggestions of concerned students;

THEREFORE,
be it further resolved by the Student Bar Association, that we do hereby clearly, undeniably, and unequivocally support and join with the Washington University School of Law Community in its pain, outrage, and struggle during the suspension of our Non-Discrimination Policy;

THEREFORE,
be it further resolved by the Student Bar Association, that we do hereby clearly, undeniably, and unequivocally support and believe in the Washington University School of Law Non-Discrimination Policy as it stands, expressly prohibiting discrimination based on gender or sexual orientation; and the method by which this Policy has historically been enforced, preventing United States Military recruitment within our walls.

EXCERPTS OF CHEMERINSKY DECLARATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 03-Civ.__

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC. ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD. IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE; ET AL., DEFENDANTS

DECLARATION OF ERWIN CHEMERINSKY

I, Erwin Chemerinsky, declare pursuant to 28 U.S.C. § 1746, as follows:

1. I am currently the Sydney M. Irmas Professor of Public Interest Law Legal Ethics and Political Science at the University of California School of Law. ("USC Law" or "the Law School"). I have been on the USC Law faculty since 1983. If called as a witness. I could and would testify to the following based on personal knowledge or, if indicated, based on information and belief. This declaration, of course, reflects my personal views and does not communicate the views of the Law School or University.

USC's Pedagogical Mission And Principles of Equality

2. USC Law's core purpose, of course, is to teach students the law. However, this means more than a rote memorization of legal rules. USC Law School is not an extended bar review course. Instead, teaching

and learning the law means exploring the philosophical, economic and intellectual underpinnings of the law in its historical and current form. It means showing the law's profound influences on society, good and bad. It means showing future lawyers and judges how their actions, from the filing of a complaint to the arguing of a case, can profoundly change our society, its mores and values. Therefore, the Law School's mission requires students to analyze those legal principles, as expressed in the Constitution, the common law, statutes, regulations, and policies, that our society now holds dear. As well, it requires a close look at those laws and legal principles our society now finds anathema, such as state sponsored discrimination. Critical to this mission is true understanding of the viewpoints that formed past laws and the viewpoints that may be sponsored or trammeled by present and future laws.

3. Diversity in our Law School and toleration of viewpoints, beliefs, and backgrounds is essential to this mission. It is only by the free expression of ideals and beliefs from individuals with a variety of viewpoints and personal experiences that the Law School's goal of teaching the law can be achieved.

4. Current and incoming students need look no further than the Student Handbook to understand that this is how USC Law has conceived the law should be taught and that this is the manner in which the law is taught. The Student Handbook contains a statement entitled USC Law's "Principles of Community." That statement begins:

> The University of Southern California's Division of Student" Affairs bears a central responsibility for the provision to students of services and resources

which will assist in their total development - intellectual, social, cultural, physical, emotional and moral.

A true and correct copy of this statement is attached at Exhibit 1.

5. It then continues:

> USC is a multicultural community of people from diverse racial, ethnic, and class backgrounds, national origins, religious and political beliefs, physical abilities, and sexual orientations. Our activities, programs, classes, workshops, lectures, and every day interactions are enriched by our acceptance of one another, and we strive to learn from each other in an atmosphere of positive engagement and mutual respect.
>
> We want to make explicit our expectations regarding the behavior of each member of our community. As adults, we are responsible for our behavior and are fully accountable for our actions. We each must take responsibility for our awareness of racism, sexism, ageism, xenophobia, homophobia, and other forms of oppression.
>
> Bigotry will not go unchallenged within this community. No one has the right to denigrate another human being on the basis of race, sex, sexual orientation, national origin, etc. We will not tolerate verbal or written abuse, threats, harassment, intimidation, or violence against person or property.

See Exhibit 1.

* * * * *

7. Consistent with its now 103 year commitment to diversity, to its fostering of a pedagogical philosophy that demands that students and faculty understand and consider diverse views, and consistent with its implied and explicit stand against discrimination as antithetical to its mission, USC has long had a written non-discrimination policy (the "Non-discrimination Policy" or "Policy"), the current version of which states:

> USC is firmly committed to a policy against discrimination based upon ethnicity, natural origin, disability, race, religion, political beliefs, gender, sexual orientation, or age.

A true and correct copy of the Policy is attached at Exhibit 3. Far from signaling a new policy, USC Law's Policy is merely a formalized statement of what has always been an integral feature of USC Law's ethos, namely that USC Law cannot tolerate discrimination of any kind in whatever form and fulfill its educational mission. USC Law recruits and enrolls students based in part on its non-discrimination policies. As well, it insists that its students, employees and faculty abide by these policies. In short, integral to USC Law's philosophy, its message and its long tradition is that discrimination will not be tolerated or sanctioned by USC Law.

8. The Law School's pedagogical mission and its policies are not mere platitudes that are handed down for reluctant enforcement. I believe them to be essential to my role as a member of the faculty. I came to and have stayed at USC Law precisely because it fosters an open environment where the ideas of all have merit and where the students can be taught to be positive and productive members of the community in all its aspects.

* * * * *

Recruiting and Career Services

10. On information and belief, USC Law extends its Non-discrimination Policy to potential employers who recruit on campus. The Law School Career Services Office instructs those employers:

> The Law School is firmly committed to a policy against discrimination based on ethnicity, national origin, disability, race, religion, gender, sexual orientation or age.
>
> Consequently, the Career Services facilities of the Law School are available only to those employers whose practices are consistent with the nondiscrimination policy. Employers are required to sign a statement of compliance before participating in any on-campus interviewing program and when listing a position with the Career Services Office. The Law School takes compliance with the non-discrimination policy seriously and will fully investigate complaint of discrimination.

A true and correct copy of this statement is attached at Exhibit 5.

11. On information and belief: there are several reasons for USC Law's decision to apply the Policy in this manner. First, it was consistent with the Law School's own non-discrimination values and messages. Second, USC Law wished to convey its non-discrimination message to as wide an audience as possible. The Law School was not merely interested in conveying the message that it did not believe in discrimination; it also wished to convey the message that it would not tolerate discrimination and would not be seen to

tolerate it expressly or implicitly. Third, USC Law students are from a diverse background and the Law School wished to ensure that each and every student had the opportunity to be considered on their merits by each and every employer who used the Career Services Office. As Law School Dean Matthew L. Spitzer explained in an August 19, 2002 open letter to the use Law community:

> The reason behind applying our policy to employers is one of fairness to our students: we recruit and enroll students based in part on our non-discrimination policies; and we-wish to assure our students that they will receive equal treatment while enrolled at USC. Therefore, we consider it inappropriate to provide services to any employer whom we know has an affirmative policy of discriminating against certain of our students in violation of our non-discrimination policy.

A true and correct copy of dean Spitzer's letter is attached at Exhibit 6.

12. As the Dean went on to explain:

> Each year the military employers seeking to recruit on campus indicate that they cannot certify that they are in compliance with the Law School's policy because they are not able to certify that they are in compliance with our policies because they discriminate on the basis of age, disability or sexual orientation.

Exhibit 6.

On information and belief, on the basis of Dean Spitzer's August 19, 2002 letter, I understand the information in the following paragraphs to be true:

13. Following the adoption of the Solomon Amendment in 1994, which threatened to cut off funding for schools that did not allow the military to recruit on campus, USC Law continued to restrict access to military recruiting at the Law School because of the military's refusal to certify that it did not engage in discrimination. See Exhibit 6.

14. When Congress enacted another version of the Solomon Amendment ("Solomon II") in 1997 which broadened the types of federal funds put at risk to include some types of student aid, USC Law was one of only a small number of schools that continued to restrict access to the military. See Exhibit 6.

15. USC Law School did not want to endorse the military's position on "discrimination, but the-likelihood of losing this federal funding prompted the Law Schools to create an exception to its non- discrimination policy for military recruiters. The Law School allowed military recruiters to recruit Law School students; however, in order to continue its long tradition and stance against discrimination, the Law School asked that the military recruiters do their recruiting at the ROTC offices located on the campus of the University of Southern California ("USC"). The ROTC offices are conveniently located on the USC campus. In contrast, all other employer interviews take place across the street from the Law School campus. See Exhibit 6.

16. Thus, USC Law did the following for military recruiters: Military recruiters were provided the standard employer information and material, information and materials provided to each and every employer recruiting on the Law School's campus; military recruiters were referred to the ROTC offices so that they could schedule space for an interview (the recruiters

were familiar with this process and the ROTC offices); the Law School then posted a notice in the weekly career services newsletter, along with all other employer announcements, the date when the military recruiters would be at USC and the place they would be located; finally, the Law School made available to all students the materials provided by the military recruiters. See Exhibit 6.

17. This process worked well for the military, and military recruitment of USC Law School students increased. Between 1990 and 1993, no graduates were hired by the military. Between 1994 and 1996 three graduates were hired. Between 1997 and 2001, nine students were hired by the military. See Exhibit 6.

18. The military recognized the benefits of this policy although it did require USC Law to make an exception to its non-discrimination policies. More than once, military recruiters initially notified the Law School that its method of accommodating military recruiters was not in compliance with the Department of Defense regulations promulgated pursuant to Solomon II. However, until 2001, each year the military changed its position and approved the arrangements. See Exhibit 6.

19. The military has gone so far as to applaud the accommodation. For example, in 1998 the Department of the Army concluded that the accommodation was in compliance with federal regulations. Lieutenant Robin L. Hall, Chief Judge Advocate Recruiting Office for the Department of the Army, wrote on August 31, 1998," Thank you for providing our military recruiters a degree of access to students that is equal in quality and scope to that afforded other employers, consistent with the regulations. . . ." Exhibit 6.

20. However, in 2001, the military changed its position, without providing a reason for doing so. On December 17, 2001, United Air Force Colonel Daniel B. Fincher wrote to the President of USC, Steven B. Sample, asking for clarification of the Law School's policies for military recruiters. USC General Counsel, Todd Dickey, responded to this letter by providing Colonel Fincher the information concerning the policy as described above. See Exhibit 6.

21. On May 30, 2002, despite six years of the same policy and as many, if not more, recruiting trips by the various branches of the military, including the Air Force, for the first time Colonel Fincher informed Mr. Dickey that the Law School was not in compliance with federal law and regulations. Colonel Fincher stated "If the law school allows the military full access to the services of the Career Services Office, the students, and the law school, your institution will be in compliance with federal law." Colonel Fincher also wrote that the Law School had to modify its practices prior to July 1, 2002. If not, Colonel Fincher's letter stated that he would recommend to the Secretary of Defense that all federal funding to the University should be denied. Exhibit 6.

22. In response to the letter, the General Counsel of USC contacted the Department of Air Force and the General Counsel of the Air Force. USC explained that the Law School's practices complied with federal regulations and that they served the goals of the military. First they allowed students interested in military employment to pursue that interest as shown by the recruiting data. In this regard, USC also noted that its military recruiting policy benefited the military because it minimized student protests that might hinder the

military's ability to recruit students. Second, they allowed the Law School to maintain its commitment to non-discrimination. Exhibit 6.

23. In response, the Air Force General Counsel, Mary L. Walker, stated that the Law School's military recruitment practices were not in compliance with federal regulations and Solomon II. The military apparently was not convinced by the data showing that the policy exception was working to the benefit of military recruiters. By letter dated August 13, 2002, the Air Force informed USC that "While we understand JAG recruiters and USC students may face protests if they participate in your OCI program, it is important the United State Air Force be treated the same as any other employer. . . ." Exhibit 6.

24. To my knowledge, nowhere in the August 13, 2002, letter, or in any other correspondence with the Air Force, was there any reason given for the military's change of position in 2001. That is, the military has never explained why the Law School's recruitment policies were satisfactory from 1995 until 2001 but not thereafter. Moreover, no one, to my knowledge, explained or has explained how treating the Air Force "the same as any other employer" would further advance the military's interest in a way that the Law School's recruitment policy would not or had not.

25. In addition to corresponding with the General Counsel of the Air Force, USC's General Counsel also spoke to a Mr. Reed, an attorney in the Office of the General Counsel of the Department of Defense. In his August 19 letter Dean Spitzer described that conversation as follows:

Mr. Reed stated that the Department of Defense would not interfere with the Air Force's decision, and that the only way to ascertain the Secretary of Defense's position on the matter would be if we prohibited the Air Force from participating in [on campus interviewing] and the Air Force recommended to the Secretary that our federal funding be revoked for non compliance. . . . Mr. Reed confirmed that Department of Defense regulations do not provide an opportunity for a school to "cure" its, perceived compliance. While we may request that the Secretary advise us of his decision prior to any action being taken with regard to our federal funding, there is no requirement that he do so.

While sympathetic to our position, Mr. Reed stated that in today's military climate, the Department of Defense "has the resolve to use whatever legal avenues are made available" to it—including the Solomon Act. He said that the current mood in the Department of Defense is that it "doesn't want to play games" with the law schools, and expects the law schools to abide by all of the protections the Solomon Act has to offer. In his view, because Congress has consistently been strengthening the Solomon Act over the past several years, Congress would disapprove if the Department of Defense did not take full advantage of the Solomon Act's protections, and the Department likely will not risk offending Congress because it continually goes before Congress for funding and other assistance. In short, while Mr. Reed would not predict how the Secretary would rule on the Law School's practice of conducting military recruiting at our ROTC

facilities, his statements implied that now is not the time to challenge the Air Force on this issue.

Exhibit 6.

26. Following this correspondence with Mr. Reed and the Air Force's General Counsel, the Law School changed its military recruitment policy. Exhibit 6. On information and belief, the military now participates in all Career Services Office programs, including the on-campus fall interview program although it violates the Law School's Non-discrimination Policy.

27. On information and belief, the Law School believed it had no choice but to do this. The only choice USC and the Law School had was to comply fully with the military's dictates or lose millions of dollars in federal funding essential to USC's well being. Even were the Law School and USC ultimately vindicated, the fact that they would receive no federal funds while pursuing that result would cripple USC and the Law School, depriving students of an education. Neither USC nor the Law School could take this risk.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

* * * * *

EXCERPTS OF ESKRIDGE DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF WILLIAM N. ESKRIDGE

I, William N. Eskridge, Jr., declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a 1978 graduate of the Yale Law School (also referred to herein as "Yale Law" or the "Law School"). Since 1998, I have been a tenured Professor of Law at the Law School and have held a Chair as the John A. Garver Professor of Jurisprudence. During academic year 2001-02, I was the Deputy Dean at the Law School. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

The Yale Law School's Educational Mission

2. In 1974, while in graduate school at Harvard University, I applied to and was admitted to several leading American law schools. The reason I chose to attend the Yale Law School was its commitment to

academic values of critical inquiry. I wanted to learn legal reasoning and rules, but I also wanted to approach this body of professional discourse critically. I found Yale to be a good environment for this pedagogical goal.

3. The mission of the Yale Law School, then and now, has not merely been to prepare students for the practice of law, but to foster thoughtful research and discourse on law and justice. This mission has been central to the Law School since at least 1874, when then-President Woolsey declared: "Let the school, then, be regarded no longer as simply the place for training men to plead causes, to give advice to clients, to defend criminals; but let it be regarded as the place of instruction in all sound learning relating to the foundations of justice. . . ."

4. Throughout its history, the Law School's faculty, students, and deans have taken a broad view of the role of law and lawyers in society. Yale Law prides itself in seeking to train lawyers not just for private practice, but for public service and teaching. Yale University ("Yale" or "the University"), the academic institution of which Yale Law is a part, has vested it with the authority to do so as it sees fit with near-absolute autonomy.

5. Because I had grown up in a sex- and race-integrated environment, I considered a plurality of voices important to the critical project. I believed that a law school creates this environment in part through the students that it selects to participate in its academic community. I was fairly well-impressed by Yale Law's student diversity during my time there (1975-78). There was a better racial, gender, and class mixture of students at the Yale Law School than I had found at my undergraduate school or at my graduate school depart-

ment. Over the last 25 years, the Law School has become significantly more diverse. From my perspective as an alumnus, and from the Law School's perspective as an institution, this has been central to the educational mission of the school.

6. Admitting a diverse class plants the seeds for free dialogue, but the hospitable setting of openness and sensitivity blooms best when the Law School is able to communicate those foundational values of diversity and equality effectively, live by them faithfully, and enforce them consistently. Yale Law's normative baseline is a commitment to respect and equality, which depends on an attitude that everyone engaged in discourse is fully equal, and that they and their ideas will be judged on the basis of their character, merits and accomplishments, not on the basis of invidious comparisons. For example, in November 2002, an African-American student was accosted in the student lounge by a staff member, who reportedly asked him, "You don't look like you belong here." That student and many others in the community were justifiably concerned about this incident. Consistent with our general non-discrimination Policy, the Dean called a town-hall meeting, where he took responsibility and offered amends for the incident. The Faculty voted to establish a committee to study the experience of racial minorities at the Law School and to suggest ways to make that experience better.

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8. In my experience as a student, however, there were limits to Yale's openness and, therefore, to Yale's commitment to cutting-edge legal discourse. Between 1975 and 1978, I do not remember a single sympathetic or even neutral reference to gay people from any pro-

fessor or student at the Yale Law School. Homosexuality was not openly discussed in any class I took—even though gay rights attorneys were challenging sodomy laws all over the country as violations of the privacy right, lesbian and gay soldiers were questioning their exclusion from the armed forces, and gay, lesbian, and bisexual teachers, publishers, and student groups were making new first amendment law almost every month. As many as 10% of my graduating class was lesbian, gay, or bisexual, but most of us were in the closet and many of us were afraid of identifying ourselves even to other gay people. The universal feeling among gay students I knew (or came to know later) was that you could not have a successful legal career if you were professionally open about your minority sexual orientation. So no one was.

9. Even a whiff of lavender would, we thought, disqualify you from jobs at the most prestigious law firms. There was some question whether one could become a member of the bar associations in some states if one were a "practicing homosexual." The *Yale Law Journal* seemed—to us—to penalize students for gender or sexual variation. One of the most brilliant students in my class was passed over for an officership of the *Yale Law Journal*, allegedly because he was considered to "flaunt" his homosexuality, and another capable student did not even submit his name for an officership, in my opinion partly because of rumors that he was gay.

10. As a closeted gay student, I assumed that being secretive about one's sexual orientation was part of the nature of things and that neither the law nor our professors offered us any hope for more dignified treatment. I was resigned to this reality, but several of my

student colleagues were not. Their activism proved to be a transforming event in the history of the Yale Law School and in my own life.

Yale Law's Adoption of a Non-Discrimination Policy in 1978

12. As of 1978, the Yale Law School had codified its credo of non-discrimination in a formal policy ("Policy") that refused to allow discriminatory employers to use our Placement Office. The 1977-1978 Bulletin (p. 113) said this:

> The Law School has long taken a vigorous stand against any discrimination on grounds of religion, race, sex, or national origin in the use of placement facilities by employers. A Placement Committee composed of faculty, students, and alumni has been formed to deal with specific complaints from students of such discrimination. * * *

(A true and correct copy of this page of the Bulletin is attached as Exhibit 1 to this Declaration.). This Policy was considered integral to the equality of opportunity and critical inquiry which we consider to be the hallmarks of the Law School. Anyone on campus who discriminates in ways that the Law School considers invidious strikes at the heart of Yale Law's values, threatens to shatter the setting of openness and sensitivity that the Law School strives so hard to cultivate, and disrupts the Law School's expression of its endorsement of the values of diversity and equality.

13. I was aware of this Policy when I was a student, and I was further aware that it did not include people like me in its protections—nor did I expect the Law School to do so. Bob Weiss, my colleague in the Class of 1978, did not share my acquiescence. He and several

other students put this inconsistency to the Law School Faculty: You are committed to equality, and you say you will not be complicit with any discrimination against your students—but the most open and pervasive discrimination is that faced by your lesbian, gay, and bisexual students. So what are you going to do about it? (We were informed that the law schools at NYU and USC had just adopted policies barring employers who discriminated against gay students.)

14. On information and belief: In meetings held in late April and the first week of May 1978, the Yale Law School Faculty deliberated a proposal by the Placement Policy Committee, that the Policy be amended to include sexual orientation discrimination.[1] A number of objections were posed. The chief ones were that the Faculty should not take positions on political issues "external to the school," and that sexual orientation discrimination was not as serious a matter as sex or race discrimination. Supporters of the proposal responded that if the Law School were going to operate a Placement Office, it must take responsibility for discrimination that occurred under its auspices. The Law School has an obligation to *all* its students, including its lesbian, gay, and bisexual students. This was an obligation of community.

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16. On information and belief: one professor reportedly summed up the dual obligations the Law School had to its lesbian, gay, and bisexual students: "[O]pposition to the proposal which rested on the absence of

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[1] I was not present at any of the Faculty meetings, but I have read the minutes of the meetings and have heard first-hand accounts from students and teachers who were present.

a record of refusals to hire missed the point. The point was the necessity for concealment of homosexuality, and consequences of such concealment. A decision on the merits was appropriate because the issue involved both our employment service and members of our community, whom we admitted without regard to sexual preference and who deserved our protection."

17. On information and belief: At the meeting of May 4, 1978, the proposal won a vote of 23 to 7, and further polling by the Dean confirmed that the proposal was adopted by the requisite majority. It was reflected in the 1978-1979 Bulletin (p. 109). The current version of the Policy is as follows:

> Yale Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, sexual orientation, or the prejudice of clients.

(A true and correct copy of this page of the Bulletin is attached as Exhibit 2.)

18. The Faculty's 1978 amendment to the Policy was perceived by most of the lesbian, gay, and bisexual students as a signal that they were accepted as equal members, perhaps for the first time, by the Law School community. On information and belief, based on conversations my student Derek Dorn (Class of 2002) or I have had with dozens of gay and lesbian Law School alumni,[2] the 1978 Policy also initiated a process by

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[2] Derek Dorn wrote his Supervised Analytic Writing paper under my supervision, "Sexual Orientation and the Legal Aca-

which the Yale Law School not only became an openly accepting place for gay, lesbian, bisexual, and transgendered students and professors, but also became a center for fact-based and critical thinking about issues of sexuality, gender, and the law.

* * * * *

20. In my informed opinion, the welcoming attitude of Yale Law to sexual and gender minorities has had a direct payoff in the intellectual life of the Law School and has had an influence beyond Yale's ivy walls. I was a Visiting Professor at Yale Law in Fall Term 1995. My main goal was to try out on the Yale students a first draft of the teaching materials Professor Nan Hunter and I had developed on Sexuality, Gender, and the Law for Foundation Press. The seminar I taught was filled with students (of various orientations) brimming with ideas and insights about these issues, and their brilliant discussions and comments on my casebook dramatically influenced us as Nan and I redrafted it in the next year. *Sexuality, Gender, and the Law*, published in 1997, is an important collaborative effort that would not have been possible without these law students—one of whom (Kenji Yoshino, Class of 1996) is now the co-author of the other leading sexuality and the law casebook, published by the West Publishing Company. Professor Yoshino and I both joined the Faculty in 1998, and we have emerged as leading authorities on the issues treated in our books and articles.

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demy: The Experience at Yale" (June 2002). Much of it was an account of the 1978 amendment to the Policy and its ramifications in the 1980s. Dorn's paper won the Scharps Prize for best paper by a third-year (graduating) student.

21. In my informed opinion, the Supreme Court's recent decision in *Lawrence v. Texas* illustrates the way in which the Yale Law School's commitment to factual, rational, and non-discriminatory discourse about sexual and gender minorities has enriched American public law. *Lawrence* overruled the Court's earlier decision in *Bowers v. Hardwick*, which had ruled that the claim that American constitutional traditions protected intimate relationships of gay people was, "at best, facetious." Scholarship by a range of thinkers, many of them post-1978 Yale Law graduates, demonstrated the factual and normative problems with the Court's opinion in *Hardwick*. Yale graduates were key players in that precedent's demise. The brief for the prevailing parties in *Lawrence* was masterminded by one Yale Law alumna (Ruth Harlow, Class of 1986, Lambda's Legal Director), and the oral argument for the petitioners was by another alumnus (Paul Smith, Class of 1979)—both beneficiaries of the 1978 Policy amendment. The opinion for the Court cited and drew heavily on the data, materials, and arguments presented by the historical brief I filed for the Cato Institute and by the international law brief Professors Harold Koh and Kenji Yoshino (both Yale Law professors) filed for Mary Robinson and various international human rights groups. The majority opinion also cited and drew extensively from my published historical critique of *Bowers*. Even Justice Scalia's dissenting opinion cited and learned much from my book *Gaylaw: Challenging the Apartheid of the Closet* (1999).

22. It is too much to say that the outpouring of Yale-based lesbian and gay advocacy and scholarship is the direct result of the 1978 Policy amendment. But I am sure that my own work criticizing *Bowers*, based upon

extensive historical research, would not have been possible without the support of the law school communities at Yale and Georgetown (where I taught from 1987-98 under the protection of a similar non-discrimination policy). I do not think it unfair to say that the nation's understanding of the historical as well as normative context of consensual sodomy laws has been deeply enriched as a result of the intellectual as well as community commitment to equality that has been the hallmark of the Yale Law School.

Application of Yale Law's Non-Discrimination Policy to Legal Employers

Recruiting At Yale

23. The Career Development Office at Yale Law (CDO) assists students and graduates in identifying career objectives and obtaining employment that meets those objectives. Its approach is to assist in self-assessment and in defining career goals, as well as in teaching students and graduates the career skills that will serve them well in the practice of law. CDO is staffed by counselors with expertise in both the public and private sectors, as well as in judicial clerkships and fellowships. Through CDO, students locate summer and full-time positions with law firms, public interest organizations, government agencies, law schools, legal services organizations, corporations, fellowship programs, judges, and others.

24. Every year, CDO sponsors a Fall Interview Program (or "FIP") for second- and third-year students and a Spring Interview Program (or "SIP") for first-years. In the fall, some 250 legal employers from all over the country and abroad register to interview students for summer and permanent positions. Another 30

employers participate in the spring program. The two formal programs are now held off-campus. Yale decided in 1982 that the presence of many employers on campus disrupted the educational environment. Students and employers who participate in the programs meet in rooms at a nearby Holiday Inn, a walk of about five to seven minutes from the Law School campus. In advance of the program, students sign up for interviews with employers of their choice. The CDO transmits the resumes of the students to each employer. Students may also sign up for any empty interview slots. Employers must take the initiative in reserving interview rooms, and make sleeping arrangements directly with the Holiday Inn. CDO does not make these arrangements.

25. Beyond these formal programs, employers have any number of vehicles by which to recruit Yale Law students—whether or not the Law School approves of the employers' hiring practices:[3]

- Employers who opt not to send a recruiter to New Haven can send targeted mailings to students.

- Employers can request a Yale Law School Facebook to determine which students it wishes to contact, then look up their email addresses on the Yale University website: www.yale.edu/yaleinfo.

- Legal employers can encourage their Yale Law School graduates to serve as mentors to student

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[3] The CDO website, <www.law.yale.edu/outside/html/career_development/cdo-empindex.htm>, lists various ways outside employers may contact Yale Law students.

organizations or to students seeking career advice by joining the Alumni Mentoring Network.

- Yale participates in the Equal Justice Works in Washington, DC, every October, and co-sponsors the Public Interest & Public Service Legal Career Symposium in New York City every February.

- Yale Law School participates in PSLawNet, a database of public interest organizations, government agencies, judges and private firms with public interest or significant pro-bono practices. PSLawNet helps students throughout the country find volunteer public interest positions.

In short, any employers interested in connecting with Yale Law students have any number of easy and effective vehicles at their disposal.

Yale Law's Non-Discrimination Recruiting Policy

26. Based upon the Policy as amended in 1978, Yale Law has adopted a firm, unshakable non-discrimination recruiting policy (the "Recruiting Policy"). An employer who discriminates may pursue any of the foregoing alternate recruiting vehicles, but the CDO will not affirmatively help them. Pursuant to Faculty policy, the CDO requires each employer using its services to sign a non-discrimination statement, which now reads:

Yale Law School Nondiscrimination Form

I, [Name of Representative], an authorized representative of [Name of Employer], affirm that said employer is aware of and complies with Yale Law School's nondiscrimination policy, as stated below:

> Yale Law School reaffirms its policy against discriminatory employment practices. The law school does not countenance any form of discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, sexual orientation, or the prejudice of clients.

(A true and correct copy of the form is attached as Exhibit 3.) That means that employers who do not sign the statement (or signify their agreement to its terms) may not participate in the fall or spring programs under the CDO's auspices and may not place job postings on the CDO website. The CDO will not help them arrange interviews.

27. Yale has applied the Recruiting Policy to discriminatory employers on more than one occasion. On information and belief: In the 1990s, the Christian Legal Society sought to participate in FIP. In light of the organization's expressed intent to use religious affiliation as well as sexual orientation as hiring criteria, Yale Law denied the request. The Christian Legal Society protested that its criteria were necessary for its mission, but the Law School insisted that it could not cooperate with even the most well-intended discrimination without compromising its Policy as amended in 1978. On the other hand, the Law School informed the Christian Legal Society that the names and contact information for Yale Law students were matters of public record, and the Society was perfectly free to contact the students without the participation of the Law School. Moreover, the Law School invited a representative of the Christian Legal Society to debate Associate Dean Stephen Yandle in the Law School Auditorium. The

Christian Legal Society accepted that offer, and I am reliably informed that the debate took place.

28. The Law School does not apply the Recruiting Policy lightly. On information and belief: After some students complained that the CIA might be discriminating on the basis of sexual orientation, the Law School investigated the claim, and declined to bar the CIA from the interview process. Yale Law applied the same attention and consideration to its decision, discussed in the following sections, to apply the Recruiting Policy to military recruiters because of the military's discrimination against gays.

Application of the 1978 Non-Discrimination Policy to Military Employers

29. Yale Law is not hostile to the military or military recruiting. To the contrary, the Law School has a long affiliation with the military. On information and belief: One of the earliest courses on military law was taught at Yale. Joe Bishop, a Yale Law student and then professor, wrote the leading casebook on military law. The Law School has trained numerous individuals who went on to work for the military, including former Secretary of the Army Clifford Alexander (Class of 1958), former Under-Secretary of Defense James Woolsey (Class of 1968), and former Under-Secretary of the Navy Jerry Hultin (Class of 1972). One former Yale Law student is now a deputy general counsel at the Department of Defense.

30. On information and belief: Once the Law School adopted the 1978 amendment to the Non-Discrimination Policy, the CDO was no longer able to cooperate with recruiters from the armed forces. Recall that CDO would not cooperate with any employer who could

not make the declaration of non-discrimination detailed in the form quoted above (Exhibit 3). The various branches of the armed forces could not make that declaration, and so the resources of CDO were not available to them. The military's policy of excluding those who admitted being gay, regardless of the content of the applicants' character or the singularity of their success, flew in the face of Yale Law's overarching mission of equality.

31. The Recruiting Policy did not, however, prohibit, or in effect prevent military recruiters from gaining entry to the Law School campus or access to Yale Law students. Recruiters have been welcome to meet with individual students or groups of students at the invitation of a student or student group; students or student groups can reserve Law School spaces for such meetings (if available). Like all employers who asked, the military received the Yale student facebook, with names and contact information of every student in the school. The military could contact any or all of these students. The Recruiting Policy did not prohibit students from contacting, interviewing with, working for or joining the military either during or after law school. Nor did the Recruiting Policy bar the military from recruiting Yale Law students where and when other employers did. Nothing stopped the military from booking a room at the Holiday Inn, posting a sign up sheet, publicizing its presence at the hotel, and interviewing students exactly when and where the other employers do.

32. The records of the Yale Law School probably do not contain all the interactions between the Law School and military recruiters in the wake of the 1978 amendment to the Policy, but I believe one exchange is repre-

sentative. In 1984 and again in 1986, military officers complained that the Law School did not give them access to its students for recruitment purposes. Both times, Associate Dean Jamienne Studley responded to their complaints. Her June 1986 letter says this:

> [C]onsistent with its commitment to freedom of speech and freedom of association, the Yale Law School does not bar military recruiting personnel from our premises or property or from contacting, interviewing or recruiting Yale Law School students. It is our policy, however, to extend the services of the Office of Career Planning and Placement only to employers that comply with the Law School's non-discrimination policy, a copy of which Dean Calabresi sent to you. Yale Law School welcomes the use of these placement services by any employer, either military or non-military, that agrees to abide by this non-discrimination policy, which applies equally to all employers.

(True and correct copies of the letters are attached as Exhibit 4.) On information and belief: There was at least one other similar exchange, occurring in the winter and spring of 1992. In response to a complaint by Brigadier General G.L. Miller of the Navy, Dean Calabresi reiterated that the Navy had full and complete access to Yale Law students—but not participation in the Law School's career services program.

33. On information and belief: The Yale Law School's Deans and other Officers implemented the Recruiting Policy, from the beginning, with an understanding that the Law School does not bar military recruiters from our campus or from having access to our students—but also with a strong understanding

that we cannot, consistent with our commitment to equality for gay people, offer our institutional imprimatur to such recruiting. These early exchanges illustrate how our Recruiting Policy has an important symbolic component. The military could continue to recruit Yale Law students, but the Law School would no longer endorse or subsidize the military's recruitment efforts by performing the matchmaking services.

34. The understanding reflected in the preceding paragraphs is reflected in the fact that a number of post-1978 graduates have served with distinction in the military. They include the Honorable James Baker (Class of 1990), Lieutenant Commander Frank Bowman (Class of 1998), Deputy General Counsel Paul Cobb (Class of 1990), Lieutenant Colonel William Lietzau (Class of 1989), NASA General Counsel Michael Schlabs (LLM Class of 1986), the Honorable Lisa Schenck (LLM Class of 1998), Michael Schmitt (LLM Class of 1991), Tyler Mulligan, Navy JAG (Class of 1999), and Michael Thomas, USAA (Class of 1995).

Yale Law School's Efforts to Comply with the Solomon Amendment

35. In 1994, Congress adopted its initial version of the Solomon Amendment (now codified at 10 U.S.C. § 983). In February 1996, Army Lieutenant Colonel Michael Child wrote Dean Kronman informing him of the new Department of Defense policy denying funds to institutions that deny or effectively prevent military recruiting personnel from having entry to campuses or access to students. Lieutenant Colonel Child asked Dean Kronman to explain Yale Law's policy in this regard. In a letter of April 2, 1996, Associate Dean Barbara Safriet explained that Yale's Recruiting Policy does not prevent access to either the campus or our

students to military recruiters. The services of the CDO, she continued, are not available to any employer not complying with Yale's non-discrimination policy—but even those employers have formal and functional access to the campus and the students. (True and correct copies of these letters are attached as Exhibit 5.)

36. On information and belief: After adoption of the Solomon Amendment, Yale Law believed it was in full compliance with 10 U.S.C. § 983, because it did not "prohibit[], or in effect prevent[]" the military "from gaining entry to campuses, or access to students on campuses." And even if the Law School's general policy of refusing to assist the military in arranging interviews were somehow considered a prohibition, Yale believed the Law School also fell within the regulatory safe harbor for schools that give the military the same level of access as every other employer. (See the regulatory attachment in Exhibit 5.)

37. Yale Law continued to stand by its non-discrimination Recruiting Policy, however. On information and belief: In 1999, and perhaps on other occasions as well, a military recruiter sought to use the services of CDO without properly signing the required Form. In August 1999, the Air Force recruiter signed the form but amended it in tiny handwriting to conform to the military's policy of no "unlawful" discrimination against lesbians, gay men, and bisexuals. The CDO rejected this submission but went out of its way to welcome the Air Force to contact students directly and to provide precise information on how to do so. Ms. Theresa Bryant, Yale's CDO Director, emphasized in her letter of October 6, 1999: "Consistent with its long standing commitment to freedom of speech and association, the

law school has never denied or prevented any recruiters from contacting our students or coming onto our campus." (True and correct copies of this letter and the exchange of letters and forms described above are attached as Exhibit 6.)

38. On information and belief: For several years the Department of Defense sent annual letters to Yale, asking whether the Law School was allowing military recruiters on its campus, and asking Yale to confirm that it was in compliance with the Solomon Amendment. Each year Yale University responded that Yale Law School does not allow *any* recruiters, including the military, to hold interviews on campus, and that Yale believed it was in compliance with the Solomon Amendment. Each time the military dropped the matter. (True and correct copies of letters from March 1998 are attached as Exhibit 7.) All of that changed in 2001, during my tenure as Deputy Dean of the Yale Law School.

39. In December 2001, Army Colonel Clyde Tate II wrote to Yale President Richard Levin expressing the Army's understanding that recruiters were being "inappropriately limited in their ability to recruit or have been refused student recruiting information at Yale University by a policy or practice of the Yale Law School," and gave the University 30 days to clarify its recruiting policy toward military recruiting. (A true and correct copy of this letter is attached as Exhibit 8.)

40. On January 14, 2002, President Levin responded with a letter to Colonel Tate, explaining that Yale University did not have a university-wide recruiting policy. The individual graduate and professional schools and Yale College, he said, each had their own policies, but none of them prohibited or effectively pre-

vented military recruitment on campus. With regard to the Law School, President Levin noted that recruiters were welcome to meet students on campus at the invitation of any student or student group; the Law School gave military recruiters (like all other recruiters) access to student directory information, and, although the CDO's interview programs were open only to those employers that comply with the nondiscrimination policy, all interviews were all held off-campus. President Levin emphasized, however, that military recruiters did not need to use CDO's services to gain entry to campus or access to students on campus. (A true and correct copy of this letter is attached as Exhibit 9.)

41. In a letter of May 29, 2002, Colonel Tate responded that the Army believed Yale was "not complying with federal law and regulations with respect to access" to the law school for military recruiting. On information and belief, the assumption of Colonel Tate's letter—and subsequent communications with Yale—was that the Department of Defense was demanding the same recruiting access for the armed forces that any other employer was provided. This requirement is nowhere to be found in the text of the Solomon Amendment, 10 U.S.C. § 983. Unless Yale modified its policies by July 31, 2002, Colonel Tate informed President Levin that the Army would consider recommending that the Department of Defense cut off Yale's federal funds. (A true and correct copy of this letter is attached as Exhibit 10.)

42. Yale Law received an extension to respond to the Army's demand, and the Yale Law Faculty met in early September 2002 to discuss the issue. A large majority of the Faculty were present, and we voted

unanimously to approve a resolution expressing our support for the Policy and our opposition to allowing any discriminating employer—including the military—to participate in the CDO recruiting process. My best recollection is that all of us who spoke at the meeting strongly endorsed the non-discrimination Recruiting Policy integral to our identity as a community of students and teachers and to our academic mission. It was, for me as well as for others who spoke, a deep violation of our academic freedom to sacrifice the integrity of the Policy to satisfy what we thought were demands that went well beyond the language of the Solomon Amendment. (No matter how many times you read the Solomon Amendment, only through stretching its language on the rack can you generate the construction placed on it by the Department of Defense, namely, that the Law School must give its recruiters the same access that non-discriminating recruiters receive.)

43. Most of us who spoke at the Faculty meeting also revealed frustration with the armed forces for what we considered bullying tactics. The prospect of imposing costs of more than $300 million on Yale University was one that we could not bear. As I listened to my colleagues' anguish over what the Defense Department was threatening, I recalled the novel *Sophie's Choice* by William Styron. Surely, the choice presented to us was not nearly so brutal or tragic as that Sophie had to make (deciding which of her children would live), but requiring us to choose between our integrity (our identity as a leading voice for non-discrimination) and the research of our colleagues in the University left me with some of the same feelings that the fictional character had—remorse and guilt (How could I face my stu-

dents, especially my lesbian and gay students?). And in our case, I also felt sadness that a democracy committed to academic freedom was putting this choice to us without either statutory or constitutional justification. With all my colleagues, I voted to give our Dean, Anthony Kronman, the authority to suspend application of the Recruiting Policy to the military if it put the University's funding in jeopardy. The resolution emphasized that the Law School's ultimate goal should be to find a means by which Yale Law could preserve its nondiscrimination policy.

44. On information and belief: On September 23, 2002, Dean Kronman and others from the University and Law School traveled to Washington, D.C. to meet with representatives of the Army's Judge Advocate General's Office. The Yale representatives offered further accommodations, including Law School-hosted informational meetings for military recruiters to talk with students. The following day, Dorothy Robinson, Yale University's General Counsel, sent Lieutenant Colonel Chris DeToro of JAG a letter formally offering these accommodations, in return for allowing the Law School to respect the integrity of its Recruiting Policy.

45. President Levin reiterated this proposal in a letter of September 26 to Army Colonel Michele Miller. President Levin also stated the two reasons for the University's belief that the Law School's Policy complied with the Solomon Amendment. First, Yale did not interpret the Solomon Amendment to require equal treatment, and equal treatment does not even become an issue under the regulations unless a school prohibits or prevents entry to campus. Second, that condition does not apply to Yale; in any event, CDO does not schedule or facilitate interviews at the law school

building for any employer. President Levin noted that Yale had not received any confirmation that the Army had modified its earlier conclusion that Yale was not in compliance with the Solomon Amendment, despite the previous discussions and submissions amplifying Yale's policies. Because so much University money was in jeopardy, President Levin informed the Army that the Law School would temporarily suspend the application of its non-discrimination requirements to military recruiters to enable them to participate in the Fall Interview Program sponsored by CDO. Again, however, he asked whether the Department of Defense believed Yale's proposal for accommodating military recruiting of law students would satisfy the Solomon Amendment. (A true and correct copy of this letter is attached as Exhibit 11.)

46. On information and belief: Two branches of the military participated in the 2002 fall program. One student interviewed with the Army through the on-line bidding system arranged by CDO, and one student interviewed with the military without going through CDO's on-line system. One student was hired for the summer program.

47. On October 17, 2002, Colonel Miller of the Army contacted the University again. Rather than respond to President Levin's inquiry, however, she informed Yale that the Army interpreted President Levin's letter to mean the Law School would not allow military recruiters to participate in CDO program in the future. Colonel Miller asked that President Levin respond by October 25, 2002, if the Army's interpretation was incorrect. (A true and correct copy of this letter is attached as Exhibit 12.)

48. In a letter of October 24, President Levin responded to Colonel Miller, reiterating the University's view that Yale's policies and practices serve the needs of military recruiters and complied with the Solomon Amendment, and noting that the University was still waiting for the Army's conclusion. President Levin informed the Army that it was incorrect in interpreting his letter to mean that military recruiters would not be allowed to participate in future interview programs. Rather, the University's intention was "to address the question of participation in the Spring 2003 Interview Program of the law school at a future time, after we have received your response." (A true and correct copy of this letter is attached as Exhibit 13.)

49. The military provided no direct response to President Levin's inquiries. Instead, Colonel Miller wrote yet another letter, dated January 6, 2003, asking the same question—whether Yale would offer the military "the same opportunity to participate in the Spring 2003 Interview Program, *as well as subsequent interview programs*, that it offers to other employers." (I have supplied the emphasis here.) The letter gave Yale 11 days to respond, and warned that the Army "will consider any response other than an affirmative one to be a negative response." (A true and correct copy of this letter is attached as Exhibit 14.)

50. In a letter of January 17, 2003, President Levin wrote to Colonel Miller that Yale was committed to working with the Army to ensure that it was in full compliance with the Solomon Amendment, and that no one from the Army or the Department of Defense had yet to respond to Yale's detailed proposal to accommodate military recruiting. In light of the ongoing threat to the University's funding, however, the Law School

would continue temporarily to suspend application of its Recruiting Policy to military recruiters to enable them to participate in the spring program. President Levin stated, however, that no determination had been made regarding subsequent off-campus interview programs, pending an explanation "within a reasonable period of time" from the Army as to whether Yale's program complies with the Department of Defense's interpretation of the Solomon Amendment.

51. In his letter of January 17, President Levin made it even easier for the Army to clarify, by asking three pointed questions. First, he asked if it was the Army's position that, in order to comply with the Solomon Amendment and its accompanying regulations, Yale must afford military recruiters "the same access to [Yale's] students as that afforded to other [non discriminating] employers." Second, if that was indeed the Department of Defense's interpretation, President Levin asked if it applied to off-campus interviewing. (The letter, reiterating Yale's position, stated that an affirmative answer to either of these questions would represent a "fundamental misreading of the statute.") Third, he inquired whether the Department of Defense had concluded that Yale's proposed arrangement violated the Solomon Amendment. (A true and correct copy of this letter is attached as Exhibit 15.)

52. The University received no answer other than a letter from Colonel Miller stating that the Army interpreted President Levin's letter as a refusal to state "whether it will apply the [non discrimination] policy to the military at future Fall and Spring interview programs." Yale had, in the Army's view, "declined to suspend permanently the application of its policy to the military and will not offer the military the same oppor-

tunities to participate in the interview program that it offers to other employers." The Army concluded that Yale was not in compliance with federal law and regulations, and vowed to forward a recommendation to the Office of the Secretary of Defense to "consider[] . . . funding denial." (A true and correct copy of this letter is attached as Exhibit 16.)

53. On information and belief: Taking advantage of Yale's decision to suspend its policy, three branches of the military sent recruiters to the CDO's spring interview program. No student signed up to interview. The recruiters knew in advance that they had no interviews but nonetheless attended the program and sat in their interview rooms for the entire day. As if to underscore Yale's argument that the military was not—and never had been—barred from the campus, one of the military recruiters at one point left his interview room, walked on campus, and entered a Law School building in full military dress. He approached a table where students from a gay and lesbian student group (OUTLAWS) were handing out literature about the military's policy, as well as rainbow pins and other tokens of solidarity. The recruiter picked up some of the literature and chatted with students at the table engaging them in a spirited discussion about the military's policy.

54. On information and belief: On March 7, 2003, President Levin called Dr. David S. C. Chu, the Under-Secretary of Defense for Personnel Readiness. During that call, the Under-Secretary reportedly committed that Department of Defense would send Yale a letter setting out its position on compliance with the Solomon Amendment, including exactly what Yale must do to satisfy the law, and that the University would have a chance to respond in writing. Levin followed up with a

letter to the Under-Secretary in which he recounted the various communications between Yale and the Army with respect to military recruiting, and emphasized that the University has repeatedly requested clarification of the Department of Defense's interpretation of the Solomon Amendment without success. He also confirmed the commitments that Dr. Chu made in their telephone conversation. President Levin requested an in-person meeting with Department of Defense representatives to answer questions and discuss alternatives to Yale's proposal, if the Department of Defense believed that the proposal was inconsistent with the Solomon Amendment. He also asked that Department of Defense give Yale at least 72 hours notice before determining officially that Yale was in violation. (A true and correct copy of this letter is attached as Exhibit 17.)

55. On May 29, 2003, Acting Deputy Under-Secretary of Defense William Carr sent President Levin a letter stating that Yale's recruitment policy with respect to military recruiters was in violation of federal law, and a recommendation would be forwarded to the Principal Deputy Under-Secretary of Defense for Personnel Readiness to declare Yale ineligible for Department of Defense funding, and, by extension, for any other funding covered by the Solomon Amendment. Department of Defense gave Yale one month—until June 29, 2003—to promulgate "a change in policy sufficient to overcome the deficiencies outlined" in the letter. (A true and correct copy of this letter is attached as Exhibit 18.)

56. In June 2003, Dean Kronman of the Law School convened a meeting of Faculty to inform us of the developments since September 2002. I was somewhat

surprised to learn that the Defense Department persisted in reading an "equal access" into the Solomon Amendment and in claiming that the Law School was not giving military recruiters effective access to our students and our campus—notwithstanding the many accommodations made by the Law School to assure such access. Like other Faculty who spoke at that meeting, I lamented the fact that the Law School had already sacrificed its non-discrimination Policy to satisfy a stance taken by the armed forces that seemed —after months of letters and requests for clarification—to be without statutory basis. Universities, I reflected, are situses of critical thought and sometimes dissent. We dissent from objectionable policies by how we structure our processes (including our placement process) as well as by how we express ourselves in writing or in public speaking. What a sad day for Yale, and what a sad day for academe, that the Defense Department is allowed to dictate to our Law School the expressive features of our governance.

57. Unable to convince the Department of Defense that Yale was in compliance with the Solomon Amendment, the Law School and the University have left in place the September 2002 suspension of the Law School's non-discrimination Recruiting Policy as applied to military recruiters. Without further action by the Department of Defense, the University, or a judge, military recruiters will be able to participate in CDO's fall interviewing program, which commences this month.

I declare under penalty of perjury that the foregoing is true and correct.

EXCERPT OF EXHIBIT 2 TO ESKRIDGE DECLARATION

BULLETIN OF YALE UNIVERSITY
Series 74
Number 10
10 August 1978

[Picture Omitted]

Yale Law School
1978-1979

* * * * *

Placement Service

The Placement Service schedules interviews at the Law School with law firms, governmental agencies, law schools, legal service organizations, corporations, public interest law firms, and others. From these interviews, mostly conducted in the fall term, many third-year students obtain post-graduation employment and many second-year students and some first-year students obtain summer jobs. In addition, files are kept in the Placement Office on job opportunities around the country. Alumni placement committees have been organized in many states and in the District of Columbia to report job opportunities and to assist graduates wishing to locate in the area.

The Law School has long taken a vigorous stand against any discrimination on grounds of religion, race, sex, or national origin in the use of its placement facilities by employers. A Placement Committee composed of faculty, students, and alumni has been formed to deal with specific complaints from students of such discrimination. This committee also has jurisdiction over discrimination based upon age and sexual orientation. A description of the makeup and functions of the Committee is contained in the Law School Placement Regulations, which may be obtained from the Placement Office.

* * * * *

EXCERPTS OF EXHIBIT 5 TO ESKRIDGE DECLARATION

[Seals Omitted]

DEPARTMENT OF THE ARMY
JUDGE ADVOCATE RECRUITING AND PLACEMENT SERVICE
8930 FRANKLIN ROAD
FORT BELVOIR, VIRGINIA 22060-5223
(800) 336-3315 (703) 806-6230
FAX: (703) 806-5382 DSN: 656-5382

February 28, 1996

Dean Anthony Kronman
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8330

Dear Dean Kronman:

I understand that military recruiting personnel are unable to recruit on the campus of Yale Law School by official policy of the Law School. Section 503 of title 10 United States Code, note, prohibits grant and contract awards of DoD funds to any institution of higher education that has a policy of denying, or that effectively prevents, military recruiting personnel entry to campuses or access to students on campuses. * * *.

Under DoD Directive 1322.13, this letter provides you an opportunity to clarify you institution's policy on military recruiting on the campus of Yale Law School. In that regard, I request the official written policy of the institution about visits of civilian employers (public or private) and military recruiting personnel to the campus for recruiting law students.

* * * Should it be determined that Yale Law School is not qualified to receive such funds, all current pro-

grams requiring payment to Yale Law School shall be stopped, and it shall be ineligible to receive future payments of DoD funds through grants, contracts, and other applicable agreements.

I regret that this action may have to be taken. Successful recruiting requires that DoD have reasonable access to students of colleges and universities, and at the same time to have effective relationships with the officials and student bodies of those institutions. I hope it will be possible for military recruiters to schedule recruiting visits at Yale Law School in the near future. * * *.

Sincerely,

/s/ MICHAEL S. CHILD
MICHAEL S. CHILD
Lieutenant Colonel, US Army
Chief, Judge Advocate Recruiting
and Placement Service

YALE LAW SCHOOL
P.O. Box 208215
New Heaven, Connecticut 06520-2815

April 2, 1996

[Seal Omitted]

BARBARA J. SAFRIET
ASSOCIATE DEAN

(203) 432-1685
(203) 432-7362 FAX

Michael S. Child
Lieutenant Colonel , U.S. Army
Chief, Judge Advocate Recruiting and
Placement Service
8930 Franklin Road
Fort Belvoir, VA 22060-5223

Dear Colonel Child:

* * * * *

Your understanding that "military recruiting personnel are unable to recruit on the campus of Yale Law School by official policy of Yale Law School" incorrect. Consistent with its longstanding commitment to freedom of speech and association, the law school has never denied or prevented *any* recruiters from contacting our students or coming onto our campus. If a military recruiter is invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus. In addition, all employers (both military and non-military) are afforded the same opportunities to inform students about their recruitment activities and to obtain available student directory information.

The Law school is also committed to equality of opportunity for all of our students. It is therefore our

policy to extend the particular services of the Career Development Office only to those employers, military or non-military, who comply with our non-discrimination policy, a copy of which is enclosed. Let me emphasized however, that utilization of the services of that office is not necessary in order for military recruiting personnel to center the campus and to have access to students and student directory information. The Yale Law School has no policy that denies or effectively prevents these activities.

* * * * *

Sincerely,
[Signature Illegible]

EXCERPT OF EXHIBIT 6 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS ELECTRONIC SYSTEM (AFMC)
HANSCOM AIR FORCE BASE MASSACHUSETTS

[Seal Omitted]

[Received: 20 Sep. 1999]

ESC/JA
35 Hamilton Street
Hanscom AFB, Ma 01731-2010

Yale School of Law
Attn: Lucy A. Mignone
Director, Recruitment Programs
P.O. Box 208330
New Haven, Ct 06250-8330

Dear Mrs. Mignone,

I recently received your correspondence regarding our proposed recruitment visit to your school. I understand your concerns regarding discrimination on the part of the prospective employers. However, the United Stated Air Force does not unlawfully discriminate in its hiring practices and my correction to your form reflected that policy. I am writing to you to restate that our hiring policies are lawful and to request that a representative from the United States Air Force be allowed to visit and meet with interested Yale student about opportunities in the United States Air Force Judge Advocate General's Department. If you are willing to accommodate this request, please send me a

written response to this letter detailing the reasons for such a denial so that I may forward it to the appropriate recruiting office for further action.

* * * * *

Sincerely,

/s/ WAYNE P. GORDON
WAYNE P. GORDON, Capt. USAF
Office of the Staff Judge Advocate

[Seal Omitted]

Yale Law School

CAREER DEVELOPMENT OFFICE

October 6, 1999

Wayne P. Gordon, Captain, USAF
Office of the Staff Judge Advocate
Hanscom AFB
35 Hamilton Street
Bedford, MA 01731-2010

Dear Captain Gordon:

* * * Consistent with its long standing commitment to freedom of speech and association, the law school has never denied or prevented any recruiters from contacting our students or coming onto our campus. If a military recruiter is invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus. In addition, all employers (both military and non-military) are afforded the same opportunities to obtain available student directory information and to inform students about their recruitment activities. * * *.

The law school is also committed to equality of opportunity for all of our students. It is therefore our policy to extend the particular services of the Career Development Office of facilitating our off campus fall interview program, only to those employers, military or non-military, who comply with our non-discrimination policy, a copy of which you have received previously. Let me emphasize, however, that utilization of the services of our office is not necessary in order for military recruit-

ing personnel to enter the campus and to have access to students and student directory information.

* * * * *

Sincerely,

/s/ THERESA J. BRYANT
THERESA J. BRYANT
Executive Director and Director of Public Interest Counseling

P.O. BOX 208330, NEW HAVEN, CONNECTICUT 06520-8330 -
TELEPHONE 203 432-2676 – FACSIMILE 203 432-8423
EMAIL CDO.LAW@YALE.EDU – HTTP://WWW.LAW.YALE. EDU/CDO
COURIERS ADDRESS 127 WALL STREET, NEW HAVEN,
CONNECTICUT 06511

Yale Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment) marital, parental, or veteran status, sexual orientation, or the prejudice of clients. All employers using the school's placement services are required to abide by this policy.

EXCERPT OF EXHIBIT 7 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837
March 16, 1998

[Seal Omitted]
REPLY TO
ATTENTION OF
JUDGE ADVOCATE RECRUITING
and Placement Service

Dean Anthony KRONMAN
Yale Law School
P.O. Box 208330
New Haven, Ct 06520-8330

Dear Dean Kronman:

I understand that military recruiting representatives are unable to recruit on the campus of your law school by a policy or practice of the university or college. * * *.

This letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of the university and its college of law. In that regard, I request, within the next 30 days, a written statement of policies with respect to a military recruiter's access to campuses of the university and its college of law, to students on those campuses, and to student directory information. Your response should specifically highlight any differences between access for military recruiters and access for recruiting representatives of other potential employers.

Based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract. That decision may affect eligibility for funding from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and related agencies. Should it be determined that the school is in violation of the aforementioned statutes, such funding would be stopped and the school would be ineligible to receive such funds in the future.

I regret that this action may have to be taken. Successful recruiting requires that Department of Defense recruiters have reasonable access to students on the campuses of colleges and universities, and at the same time have effective relationships with the officials and student bodies of those institutions. I hope it will be possible to develop an on-campus recruiting arrangement allowing reasonable access to your law students. I am available to answer any questions.

Sincerely,

/s/ DIANA MOORE
DIANA MOORE
Lieutenant Colonel, U.S. Army
Chief, Judge Advocate
Recruiting and Placement
Service

Copy Furnished:

Mr. Richard Levine
President, Yale University
Woodbridge Hall
43 Hillhouse Avenue
New Haven, CT 06520

[Seal Omitted]
Yale Law School

BARBARA I. SAFRIET
Associate Dean

March 31, 1998

Diana Moore
Lieutenant Colonel, U.S. Army
Chief, Judge Advocate Recruiting and
Placement Service
901 North Stuart Street
Arlington, VA 22203-1837

Dear Colonel Moore:

As the Associate Dean responsible for career services, I am pleased to respond to the concerns raised in your recent letter to Dean Anthony Kronman regarding military recruitment of Yale Law School students.

Your understanding "that military recruiting representatives are unable to recruit on the campus of your [Yale Law] school by a policy or practice of the university or college" is incorrect. Yale University does not have "a policy or practice of denying military recruiting representatives entry to campuses, access to students on campuses, or access to directory information on students."

Consistent with its long standing commitment to freedom of speech and associations, the law school has never denied or prevented *any* recruiters from contacting our students or coming onto our campus. If a military recruiter is invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus. In addition, all em-

ployers (both military and non-military) are afforded the same opportunities to inform students about their recruitment activities and to obtain available student directory information.

The law school is also committed to equality of opportunity for all of our students. It is therefore our policy to extend the affirmative assistance of the Career Development Office only to those employees, military or non-military, who comply with our non-discrimination policy, a copy of which is enclosed. Let me emphasize, however, that utilization of the services of that office is not necessary in order for military recruiting personnel to enter the campus and to have access to students and student directory information. The Yale Law School has no policy that denies or effectively prevents these activities.

Finally, I should note that approximately 98-99% of employers' recruitment activities do not take place on the campus. Despite the traditional misnomer, our Fall and Spring "On-Campus Interview" programs are all held at a hotel in New Haven. When I explained this to Lieutenant Colonel Michael S. Child (former Chief, Judge Advocate Recruiting & Placement Service) during our conversations in April 1996, he acknowledged that there had been a misperception concerning this issue.

I trust that this information will clarify our recruitment policy. Please let me know if your need any additional information.

Sincerely,

[Signature Illegible]

EXCERPTS OF EXHIBIT 8 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

Seal REPLY TO ATTENTION OF: December 17, 2001

Personnel, Plans, and Training Office

Richard Charles Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

I understand that military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused student recruiting information * * * at Yale University by a policy or practice of the Yale Law School.

This letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of Yale University as well as Yale Law School. In that regard, I request, within the next 30 days, a written policy statement of the institution with respect to access to campus and students, and to student recruiting information, by military recruiting personnel. Your response should highlight any difference between access for military recruiters and access for recruiting by other potential employers. Specifically, 32 CFR 216.4(c)(3) requires that schools denying cam-

pus access, while identifying an alternative site, present evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers.

Based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract. That decision may affect eligibility for funding from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and related agencies. Should it be determined that Yale University as an institution of higher education (or any subelement of the institution) is in violation of the aforementioned statutes and regulations, such funding would be stopped, and the institution of higher education (including any subelements of the institution) would be ineligible to receive such funds in the future.

I regret that this action may have to be taken. Successful recruiting requires that Department of Defense recruiters have reasonable access to students the on campus uses of colleges and universities, and at the same time, have effective relationships with the officials and student bodies of those institutions.

* * * * *

Sincerely,

/s/ CLYDE J. TATE II
CLYDE J. TATE II
Colonel, U.S. Army
Chief, Personnel, Plans, and
Training Office

EXCERPT OF EXHIBIT 9 TO ESKRIDGE DECLARATION

January 14, 2002

Clyde J. Tate II
Colonel, U.S. Army
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, Virginia 22209

Dear Colonel Tate:

* * * * *

Yale University does not have a university-wide policy with respect to recruiting on campus. Each of the graduate and professional schools and Yale College set their own policies with regard to career services. However, none of the schools prohibit or effectively prevent military recruiting on campus. Military recruiting personnel from the Air Force came on campus at the School of Epidemiology and Public Health last year. Army personnel also requested and gained access to the School of Nursing for recruiting purposes last year. At other times in the past, the Army, Navy and Marines have all requested and gained access to campus in order to recruit undergraduate students.

Your understanding that "military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused recruiting information at Yale University by a police or practice of Yale Law School" is incorrect. Consistent with its long-standing

commitment to freedom of speech and association, the law school has never prohibited or prevented any recruiters from obtaining entry to campus or access to students on campus. If a military recruiter's invited by a law student or law student organization, the recruiter is welcome to meet with the student(s) on campus. In addition, all employers (both military and non-military) are afforded access to directory information on students.

It is the policy of the law school to hold all interview programs sponsored by its Career Development Office off-campus. Those programs are open only to those employers, military or non-military, who comply with its non-discrimination policy. Let me emphasize, however, that utilization of the services of that office is not necessary in order for military recruiting personnel to gain entry to campus or to have access to students on campus, as required by 10 U.S.C. § 983. The Yale Law School has no policy that denies or effectively prevents these activities.

* * * * *

Sincerely,

Richard C. Levin

EXCERPT OF EXHIBIT 10 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

Seal REPLY TO ATTENTION OF: May 29, 2002

Personnel, Plans, and Training Office

Richard Charles Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

This replies to your letter dated January 14, 2002, which responded to our earlier request that you clarify your institution's policy regarding military recruiting on your law school campus. Based on your letter and reports from our field screening officers, we believe that your institution is not complying with federal law and regulations with respect to access to your law school for military recruiting. In particular, the following information indicates that your institution is not in compliance with federal requirements:

a. The Law School has an institutionalized policy that limits military recruiting.

b. The military services are not provided access to interview programs sponsored by the Law School's Career Development Office (CDO). The CDO's off-

campus program is the primary means through which employers interview prospective applicants.

c. Military recruiters are not permitted to recruit on campus unless invited on campus by a law student or law student organization.

* * * * *

* * * Unless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements, or that the above information about your school is incorrect, we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial.

I regret that this action may have to be taken; however, as provided in federal law it is imperative that Department of Defense recruiters have reasonable access to your law school campus. * * *

* * * * *

Sincerely,

/s/ CLYDE J. TATE II
CLYDE J. TATE II
Colonel, U.S. Army
Chief, Personnel, Plans,
and Training Office

EXCERPT OF EXHIBIT 11 TO ESKRIDGE DECLARATION

Yale University

Office of the President

105 Wall Street, PO Box 208229
New Haven CT 06520-8229

September 26, 2002

Colonel Mickey Miller, U.S. Army
Chief, Personnel, Plans & Training Office
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, Virginia 22209

Dear Colonel Miller:

I write in response to Colonel Tate's letter dated May 29, 2002, regarding the Yale Law School. Yale University and the Yale Law School both recognize and value the many men and women who devote their lives to the military service of this country. We are proud of the many Yale graduates who have served with commitment and distinction, and we have sought to reflect those value in the approach we have taken to military recruitment of Yale Law students.

As I have previously written to Colonel Tate, we believe that the Yale Law School is currently in full compliance with the Solomon Amendment. * * *

* * * * *

Military recruiters are welcome to visit the Yale Law School. We have made it clear both in those communications and at the meeting which Yale's Vice President and General Counsel, Dorothy Robinson,

Dean Anthony Kronman and Associate Dean Barbara Safriet had with you on September 23, 2002, that we will make a Yale Law School classroom available for representatives of any of the services to use for an informational presentation to students, and afterwards for further discussions of any nature with students. Yale Law School students and any visiting employers—including military recruiters—are free to meet in any available location within the Yale Law School building for interviews or other purposes, and a student may reserve a room in the building in advance for such a meeting. Additionally, to accommodate the needs of the military for facilitated interviews, we have offered to provide a contact person at Yale who will schedule interviews in a reserved room in the Undergraduate Career Services Office on the University's campus, if any of the military services wish. * * *

* * * * *

Colonel Tate's principal complaint about the Yale Law School's practices instead focuses on the Law School's requirement that employers seeking to utilize the services of the Law school's Career Development Office sign a "non-discrimination" certification before being able to participate in its interview program which is held off campus twice a year at a nearby hotel. In effect, the complaint is not that the Army has been denied access—or even that the Army has not been offered assistance in meeting with students or setting up interviews—but that it has not been given the identical set of services provided to other employers. The statute, however, does not require equal treatment; and equal treatment does not even potentially become an issue under the religious unless a school prohibits or prevents entry to campus, 32 C.F.R. §

216.4(c). That condition does not apply to Yale. I also would point out that the Career Development Office does not schedule or facilitate interviews in the Yale Law School building for any employer.

The University intends to pursue a further agency or judicial determination of whether the Law School's long-standing practices and policies, as amplified in our recent communications, satisfy the requirements of the Solomon Amendments, as we believe they clearly do.

In the meantime, as you know, we have not received from you any confirmation that you have modified Colonel Tate's conclusion stated in his May 29, 2002 letter that Yale is not in compliance with the Solomon Amendment, despite our discussions and submission amplifying our policies. This leave us in a position of uncertainty regarding your judgment in this matter. Therefore, in order that we may pursue a determination of our contention that the Law School is in compliance with the Salomon Amendment without jeopardizing the University's federal funding, the Law School will temporarily suspend the application of its non-discrimination certification requirement to military recruiters to enable them to participate in the 2002 Fall Interview Program organized by the Career Development Office of the Law School. If you wish to participate in that program, your representative should contact Christine Severson at the Law School's Career Development Office at (203) 432-1676 for further information and assistance.

Sincerely,

/s/ RICHARD C. LEVIN
RICHARD C. LEVIN

EXCERPT OF EXHIBIT 12 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

Seal REPLY TO ATTENTION OF: October 17, 2002

Personnel, Plans, and Training Office
By Fax ((203) 432-7105) and U.S. Mail
Richard C. Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

This responds to your letter dated September 26, 2002, outlining proposed changes to Yale University's policy regarding military recruiting. We are grateful that military recruiters were allowed to participate in this fall's interview program organized by the Law School's Career Development Office. We interpret your letter, however, as stating that Yale University will not allow military recruiters to participate in this program in the future and that the Career Development Office will not facilitate such participation. Please let us know by October 25, 2002, if our understanding is correct.

* * * * *

/s/ MICHELE M. MILLER
MICHELE M. MILLER
Colonel, U.S. Army
Chief, Personnel, Plans, and
Training Office

EXHIBIT 13 TO ESKRIDGE DECLARATION

Oct. 24, 2002

Colonel Michele M. Miller, U.S. Army
Chief, Personnel, Plans & Training Office
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, Virginia 22209

Dear Colonel Miller:

I write in response to your letter dated October 17, 2002. As our representatives have told you, we would like to work with the Army and other military services to provide access to students at the Law School in a manner that serves the needs of military recruiters and complies with the Solomon Amendment. * * * We are still waiting for the Army's conclusion regarding this matter and its explanation of the basis of that conclusion. As you know, in the interim, earlier this month, both the Army and the Air Force were included in the Fall Interview Program sponsored by the Career Development Office of the Law School.

You are not correct that we have stated we will not allow military recruiters to participate in future interview programs of the Law School's Office of Career Development. We intend to address the question of participation in the Spring 2003 Interview Program of the Law School at a future time, after we have received your response.

Sincerely yours,

Richard C. Levin

EXCERPT OF EXHIBIT 14 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209

Seal REPLY TO ATTENTION OF: January 6, 2003

Personnel, Plans, and Training Office

By Fax ((203) 432-7105) and U.S. Mail
Richard C. Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

This responds to your letter dated October 24, 2002, stating that Yale will address participation in the Spring 2003 Interview Program after you have received a response from us regarding the proposed changes to your military recruitment policy as outlined in your letters dated September 24 and 26, 2002. As part of evaluating your proposed changes, we need to know whether Yale will offer the military the same opportunity to participate in the Spring 2003 Interview Program, as well as subsequent interview programs, that it offers to other employers. We will consider any response other than an affirmative one to be a negative response. Accordingly, please let me know by January 17, 2003, if you intend to allow military recruiters to

participate in the Spring 2003 Interview Program and subsequent interview programs.

* * * * *

Sincerely,

/s/ MICHELE M. MILLER
MICHELE M. MILLER
Colonel, U.S. Army
Chief, Personnel, Plans, and
Training Office

EXCERPT OF EXHIBIT 15 TO ESKRIDGE DECLARATION

YALE UNIVERSITY

OFFICE OF THE PRESIDENT
305 WALL STREET,
P.O. BOX 208229
NEW HAVEN,
CT 06520-8229

January 17, 2003

Colonel Michele Miller, U.S. Army
Chief, Personnel, Plans & Training Office
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, Virginia 22209

Dear Colonel Miller:

* * * * *

As I have previously written, Yale believes that its proposal plainly satisfies the requirements of the Solomon Amendment. Nevertheless, so that we may obtain a determination of our compliance without jeopardizing the University's federal funding, the Law School will continue temporarily to suspend application of its non-discrimination certification requirement to military recruiters to enable them to participate in the 2003 Spring Interview Program. We have not made a determination with regard to subsequent off-campus interview programs because, as noted in my earlier letters, we continue to await an explanation from the Department of the Army as to whether Yale's program complies with the Department of Defense's interpretation of the Solomon Amendment. We are willing to continue this suspension until we obtain that

determination, provided that it is forthcoming within a reasonable period of time.

Because we believe that the Law School proposal fully complies with the Solomon Amendment, we cannot correct any asserted deficiencies in it without the Army clarifying in what respects, if any, it believes the proposal is legally inadequate. In order to understand the Department's position regarding our obligations under the Solomon Amendment, we thus request that you answer the following questions:

First, is it your legal position, as your most recent letter can be read to state, that in order to comply with the Solomon Amendment and its accompanying regulations a covered school must afford Department of Defense recruiters "the same access to [Yale's] students as that afforded to other employers"? If that is your interpretation, do you contend that it applies to off-campus interviewing? In our view, an affirmative answer to either of these questions represents a fundamental misreading of the statute. As we read the statute, all that is required is that a covered school allow military recruiters access to students on campus, which the Law School does.

Second, is it the concluded view of the Department of the Army and the Department of Defense that Yale's proposed arrangement, as previously explained in letters dated September 24, 2002, and September 26, 2002, violates the Solomon Amendment and its accompanying regulations. For ease of reference, I repeat here the central features of the Yale Law School arrangement we have offered:

1. Military recruiters are welcome to visit the Yale Law School campus.

2. Upon request, the Law School will provide full use of a classroom for representatives of any of the military services to use for an information presentation to students, and afterwards for further discussions of any nature with students.

3. Yale Law School students and any visiting employers–including military recruiters–are free to meet in any available location within the Law School building for interviews or other purposes and a student may reserve a room in the building in advance for such a meeting.

4. If a representative of any of the military services would like University assistance in facilitating interviews with law students, upon request the University will provide a representative who will schedule interviews in a reserved room in the Undergraduate Career Services Office on the University's campus.

5. The military services may request and receive student contact information, which can be used to provide students with instructions for submitting resumes either to a representatives of the military or to Yale's contact person for facilitating interviews.

* * * * *

Sincerely yours,

Richard C. Levin

RCLmd

EXCERPTS OF EXHIBIT 16 TO ESKRIDGE DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

Seal REPLY TO ATTENTION OF: March 3, 2003

Personnel, Plans, and Training Office

By Fax ((203) 432-7105) and U.S. Mail
Richard C. Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear Mr. Levin:

This replies to your letter dated January 17, 2003, which responded to our January 6, 2003 request that you clarify your institution's policy regarding military recruiting involving your law school.

In our January 6 letter, we asked you state whether Yale will offer the military the same opportunities to participate in the school's interview program that it offers to other employers, and we noted that we would interpret any response other than an affirmative response as a negative response. You did not respond affirmatively to our question concerning future access to interview programs.

To summarize, we understand that (i) Yale's response confirms that the law school has a policy that an employer must sign a non-discrimination certification to participate in the Fall and Spring interview programs,

and (ii) although this policy was suspended with respect to military recruiters for the Fall 2002 interview program and will be suspended again for the Spring 2003 program, Yale has refused to state whether it will apply the policy to the military at future Fall or Spring interview programs. That is, Yale has declined to suspend permanently the application of its policy to the military and will not offer the military the same opportunities to participate in the interview program that it offers to other employees. Based upon your letters and reports from our field screening officers, and after considering your proposed recruiting policy, we believe that your institution is not in compliance with federal law and regulations regarding access to your law school for military recruiting.

* * * * *

Accordingly, in accordance with 32 CFR, Part 216, I am forwarding this matter to the Office of the Secretary of Defense for consideration of funding denial.

* * * * *

/s/ MICHELE M. MILLER
MICHELE M. MILLER
Colonel, U.S. Army
Chief, Personnel, Plans, and
Training Office

EXCERPT OF EXHIBIT 17 TO ESKRIDGE DECLARATION

YALE UNIVERSITY

OFFICE OF THE PRESIDENT

FOR WALL STREET,
P.O. BOX 208229
NEW HAVEN CT 06520-8229

March 10, 2003

Dr. David S.C. Chu
Under Secretary of Defense
For Personnel and Readiness
100 Defense Pentagon
Washington, D.C. 20301-1000

Dear Dr. Chu:

* * * * *

Yale has long history of working cooperatively with the military. We have repeatedly made clear that military recruiters are welcome to visit the Yale campus and that both the Law School and the rest of the University would take steps to accommodate military recruiters. Yale has never taken the position that military recruiters should be denied "entry to campuses" or "access to students on campuses[] . . . for purposes of military recruiting." 10 U.S.C. § 983(b). During a meeting held in September 2002 with Colonel Miller, Yale's Vice President and General Counsel and the Dean of the Law School, described the Law School's approach indicated their willingness to be responsive to the Army's concerns in arranging recruiting visits by

the military, consistent with the Law School's policy on non-discrimination.

In its correspondence with the Army, Yale has repeatedly requested clarification of the Department of Defense's interpretation of the Solomon Amendment, and for the legal authority that supports that interpretation. The Army has not responded to that request.

At the same time, while those requests have been pending, including most recently as described in my letter dated January 27, 2003, Yale has suspended application of the Law School's non-discrimination certification requirement for military recruiters during the School's 2002-03 Interview Programs. In fact, on February 6, 2003, recruiters from the Army, Navy and Air Force all participated in that Program alongside other employers. Nonetheless, the Army has made a determination of current non-compliance based on Yale's failure to avow for the future that the Law School will dispense with its non-discrimination certification requirement. We believe that determination was premature and not properly founded.

Now that the matter has been referred to the Department of Defense pursuant to 32 C.F.R. § 216, you have indicated that, prior to any determination of ineligibility, the Department will send us a letter setting out its position on compliance with the Solomon Amendment, including exactly what Yale must do to be compliant. You also confirmed that we will be afforded an opportunity to make a written submission. We appreciate that confirmation.

Given the severe consequences of any final determination of noncompliance with the Solomon Amendment, I respectfully make the following requests. First,

I would again request a face-to-face meeting with Department representatives, in order to answer questions and to discuss alternatives to Yale's proposal, if the Department believes that it is inconsistent with the Solomon Amendment. Second, if the Department reaches a final conclusion that Yale is not in compliance with the Solomon Amendment, I request that Yale be notified at least 72 hours prior to any determination of ineligibility under 32 C.F.R. § 216.5(a)(1), so that the University may decide its course of action.

Thank you for your consideration of these requests.

Sincerely yours,

/s/ RICHARD C. LEVIN
RICHARD C. LEVIN

RCL:md

cc: Colonel Michele M. Miller

EXCERPTS OF EXHIBIT 18 TO ESKIDGE DECLARATION

OFFICE OF THE
UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

May 29, 2003

[Seal]
PERSONNEL AND READINGS
By Fax [(203) 432-7105] and U.S. MAIL

Richard C. Levin
President, Yale University
P.O. Box 208279
New Haven, Connecticut 06520

Dear President Levin:

* * * * *

As the Department of the Army has advised, Yale University, acting through Yale Law School ("Yale"), has a policy that employers must sign a certification to use the services of the Yale Law School Career Development Office (CDO), including participation in the spring and fall interview programs. This certification requirement is inconsistent with federal law because it constitutes a policy or practice . . . that either prohibits, or in effect prevents . . . [the military] from gaining . . . access to students (who are 17 years of age or older) on campuses for purposes of military recruiting." 10 U.S.C. § 983(b)(1); *see also* 43 C.F.R. § 216.4(a). The certification that Yale requires will prevent the military from participating in the

interview programs for employers organized by the CDO.

Yale has indicated that it is willing to provide an alternate mechanism for military recruiters to attempt to contact students at Yale, including permitting recruiters to use a room in the Yale Law School building. As explained below, I have determined that for two reasons Yale's proposed policy violates federal law. First, the Department of Defense (DoD) has interpreted section 983 to require universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters. Yale's policy clearly fails to do this. Second, even if the statute did not require equal treatment, it squarely prohibits any policy that "in effect prevents . . . access to students." 10 U.S.C. § 983(b)(1). Under the particular circumstances here, we have concluded that exclusion from university-sponsored interview programs denies military securities effective access to students.

1. *Yale's Policy Fails to Provide Access that Is At Least Equal in Quality and Scope to that Provided to Other Employers.*

Yale's exclusion of the military from the centralized interview process organized by the CDO and instead permitting an alternative means for military recruiters to contact Yale Law School students fails to meet the requirements of the law for two reasons. First, DoD has interpreted section 983 to require that universities provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers. By its terms, the statute announces the clear objective of prohibiting any policy or practices that "in effect prevents . . . access to

students." *See* 10 U.S.C. § 983(b)(1). In interpreting this requirement, DoD has concluded that effective access to students requires that there not be a substantial disparity in the treatment of military recruiters as compared to other potential employers. This understanding also promotes the clear objective of the law, which is to ensure that the military is not disadvantaged in relationship to other employers in recruiting from this Nation's universities. This interpretation is reflected in the sample letter or inquiry found in DoD's regulations that assessing compliance with 10 U.S.C. § 983 requires consideration of "any difference between access for military recruiters and access for recruiting by other potential employers." 32 C.F.R. Part 216 Appendix A; *see also* Letter to President Levin, Yale University, from COL Tate, Department of the Army (Dec. 17, 2001) (using same language).

This interpretation is also reflected in the regulations DoD has promulgated concerning circumstances in which the Secretary of Defense may determine that the prohibition of the statute do not apply. *See* 32 C.F.R. § 216.4(c). Many of these circumstances are based on a showing that the school's policy is applied similarly to other employers. *See id.* at § 216.4(c)(3), .(5), (6)(i), (6)(ii). In particular, the consequence of loss of funding will not apply where "the Secretary of Defense determines that the covered school . . . [w]hen not providing requested access to campus or to students on campus . . . presents evidence that the degree of access by military recruiters is *at least equal in quality and scope* to that afforded to other employers." *Id.*, § 216.4(c)(3) (emphasis added). This means that, even if the physical and temporal means of access is not

identical in all respects, the *degree* of access allowed military recruiters must be the same or greater than that afforded to other employers. This reflects the underlying principle that under DoD's construction of the statute, the prohibition of the law is designed to ensure military recruiters access to students that is equally effective as that provided to other potential employers.

This construction also best harmonizes section 983 with Congress' objectives regarding recruiting. As the Third Circuit has explained, "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." *United States* v. *City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). Accordingly, 10 U.S.C. § 983 should, and will, be construed to require equal access for military recruiters—the construction that better permits the military to fulfill congressional interest.

Yale's proposed alternate arrangement therefore does not satisfy federal law because it does not satisfy the requirement that the degree of access to students be "at least equal in quality and scope to that afforded to other employees." *See* 32 C.F.R. § 216.4(c)(3). By prohibiting the military from using the services of the CDO, Yale's approach would impose substantial burdens and restrictions on military recruiters to schedule interviews with students through e-mail or other means, rather than through the standard processes provided by the CDO to other employers. The Yale approach would further hamper military recruiters by forcing them into a process that is fundamentally different from the one-stop-shopping that Yale establishes to allow students easy, streamlined access to a host of

other employers. This is clearly inconsistent with both the letter and spirit of the law.

Moreover, by singling out military recruiters, Yale sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs. This unequal treatment is clearly contrary to that required by law and regulation.

II. *Yale's Policy In Effect Prevents Access to Students*

* * * * *

Military personnel who have recently recruited at Yale Law School have reported that all significant interview scheduling and job information flowing through the Law School is maintained at the CDO. Possible alternative means of access (e.g., soliciting invitations from student groups, collecting names from the student directory) have proven inefficient at best and futile at worst. In sum, access through the standard processes of the CDO is a critical step in the recruiting process.

* * * * *

* * * Any other program limited to military recruiters will necessarily be second-rate.

As a result, Yale has created a system in which both students and prospective employers are conditioned to think there is one, central, organized system for distributing information about employers and matching interested students with appropriate employers. Shutting the United States Armed Forces out of that centralized process and relegating them instead to an

ad hoc mechanism of attempting to reach students *outside* the established procedures constitutions a policy that "in effect prevents access . . . to students."

* * * * *

IV. *Conclusion*

* * * * *

Although Yale has on two occasions during this current academic year waived its policy with respect to participation in the interviewing programs, Yale has refused to state whether it will apply the policy to the military for future interviewing seasons. That is, Yale has declined to suspend permanently the application of its policy to the military and will not offer the military the same opportunities to participate in the interview program that it offers to other employers. The policy thus remains an obstacle to military recruiters and their ability to plan for, schedule, and gain access to Yale Law School students for the purpose of military recruiting. By not providing the military's requested access and in effect preventing the military from gaining access to students, Yale's policy is in violation of federal law.

Therefore, it is my duty under law to recommend to the Principal Deputy Under Secretary of Defense for Personnel and Readiness that Yale University be determined ineligible for Department of Defense funding. * * *

Sincerely,

/s/ WILLIAM J. CARR
WILLIAM J. CARR
Acting Deputy Under Secretary
(Military Personnel Policy)

EXCERPT OF GERKEN DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICA LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF HEATHER GERKEN

I, Heather Gerken, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Assistant Professor of law at Harvard Law School ("Harvard Law School" or "the Law School"). I file this declaration in a personal capacity, and not as a representative of Harvard Law School or its faculty. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

2. In addition to being the oldest continually operating law school in the country, Harvard Law School is also one of the nation's largest. The Law School's size, I believe, is one of its greatest strengths. As excerpts from promotional materials on the Harvard Law School website note, it allows for a deep and rich curriculum, with more than 250 elective courses and seminars offered each year. It supports a wide array of

research programs and student organizations; indeed, the website lists more than 90 of the latter. It has generated an exhaustive network of graduates; according to the Office of Admissions more than 65,000 students have studied at the Law School. Perhaps most importantly in my view, the Harvard Law School community includes a diverse student body, faculty and administration, through which the Law School, "is able to contribute solutions to the world's most complex legal and social challenges." A true and correct copy of the website materials are attached at Exhibit 1.

3. Harvard Law School is a place where, as Dean Elena Kagan explains in her welcome message on the Law School website, "rigorous and exciting legal training is intimately connected to the School's commitment to pathbreaking scholarship." Within these teaching and research activities, Dean Kagan explains further that:

> [e]ngagement with the world is a key feature and object. Harvard Law School is a place for people who love ideas because ideas make a difference, who want to think about the law's interaction with public policy and business, who care about how things work and how to improve them, who wish to avail themselves of the diverse opportunities that the legal profession offers to serve the public. . . . At Harvard Law School, and for all these people connected with it, the study of law is not an arid intellectual exercise. The study of law matters, and this is what gives Harvard Law School its sense of purpose and mission.

A true and correct copy of the Dean's message is attached Exhibit 2.

4. I think that respect for differences within the Harvard Law School community is critical to this mission. While the great diversity of views and backgrounds among our students and faculty make Harvard Law special, it is the extent of the Law School's commitment to protect and nurture this diversity that, in my view, makes it unique among institutions of higher education.

5. To give one example, I believe that the diversity in outlook, views, and experiences within our student body leads to a rich teaching environment in which all members of the community learn from one another. I have found that my classroom has been greatly enriched by the presence of a wide range of students who respect the differences and disagreements among them.

6. Harvard Law School has long maintained a recruiting policy (the "Policy") providing that:

> No employer may discriminate in any form based upon race, color, creed, national or ethnic origin, age, gender, sexual orientation, marital or parental status, disability, source of income, military status or status as a Vietnam era or disabled veteran. This rule applies not only to offers of employment, but also to salary scales, working conditions, type of work available, and promotion policies. It includes statements expressing discriminatory intentions or referring to race, color, creed, national or ethnic origin, age, gender, sexual orientation, marital or parental status, disability, source of income, military status or status as a Vietnam era or disabled veteran, which a student can reasonably perceive to be derogatory or offensive. These classifications are illustrative, not exhaustive.

A true and correct copy of the Policy is attached at Exhibit 3. The Policy and the other policies and guidelines concerning recruiting at Harvard Law are enforced by the Committee on Placement. Sanctions may be imposed for failing to comply. See Exhibit 3.

7. Harvard Law School requires that any employer who wishes to recruit on campus and utilize the services of the Office of Career Services abide by the Policy, and must sign a statement to that effect. See Exhibit 3.

8. The Office of Career Services page on the Law School's website notes that each year the office receives a number of complaints from students about offensive or discriminatory behavior on the part of interviewers, and also notes that there are formal procedures in place for students to complain about such behavior. See Exhibit 3.

The following, unless otherwise indicated, is on information and belief:

9. As explained in an August 23, 2002 memorandum to the Harvard Law School Community (the "Memo") from then-Dean Robert C. Clark ("Dean Clark"), a true and correct copy of which is attached at Exhibit 4, because military recruiters did not sign such a statement, they were not permitted to utilize the services of the Office of Career Services.

10. Dean Clark also stated that the Law School's application of the Policy did not prevent the military from recruiting effectively at the Harvard Law. Any official organization at the Law School may invite any person or organization onto campus. Prior to 2002, the Harvard Law School Veterans Association ("HLSVA"), a recognized student organization, invited military

recruiters to campus and facilitated their efforts at Harvard Law School. See Exhibit 4.

11. Under this system an average of one to three Harvard Law students each year joined one of the branches of the JAG Corps.

12. While Harvard's policy did not prevent the JAG Corps from recruiting Harvard students, I believe that it was important to some members of the law school community, as reflected in Dean Clark's statement in the Memo that "for many of us, a policy nondiscrimination on the basis of sexual orientation reflects a fundamental moral value." Exhibit 4.

13. In the Memo, Dean Clark announced that, in the 2002-2003 academic year, for the first time since the Law School included sexual orientation in its nondiscrimination policy, the U.S. military would be allowed access to the facilities and services of the Law School's Office of Career Services. See Exhibit 4.

14. Dean Clark explained that, back in 1998, the Air Force asked the Law School for information to determine whether it was in compliance with the Solomon Amendment. Dean Clark responded to the inquiry by explaining the Law School's non-discrimination policy for the Office of Career Services and the practice of having the military recruit through HLSVA. Based on this information, the Air Force determined that the Law School was in compliance with the Solomon Amendment. In December 2001, the Air Force again contacted the Law School regarding its policies toward military recruiters. As Harvard Law School's practices had not changed since the military's last inquiry, the Law School's initial response mirrored that which was sent in 1998. See Exhibit 4.

15. However, on May 29, 2001, the Air Force notified Dean Clark that it no longer viewed the Harvard Law School policy as being in compliance with the law. The Air Force's letter said that unless the Law School showed by July 1, 2002 that its "policies and practices had been modified to conform with federal requirements," the Air Force would "forward this matter to the Office of the Secretary of Defense with a recommendation of funding denial." Exhibit 4.

16. The Dean explained in the Memo that the Law School does not receive significant federal funding. The University, however, annually receives approximately $328 million from the federal government, which comprises approximately 16% of its operating budget. Under the terms of the Air Force's letter, it appeared that the Law School's refusal to permit military recruiters access to the services of the Office of Career Services would make the entire University ineligible for appropriations from the Departments of Defense, Transportation, Health and Human Services, Education and their related agencies. See Exhibit 4

17. Dean Clark wrote that because Harvard Law School's recruiting practices had implications beyond the Law School, he discussed the issue with Harvard University's general counsel extensively over the summer, and consulted with Harvard President Lawrence Summers. He said he also met with the Law School Placement Committee and took counsel from other faculty members and senior administrators of the Law School. At Dean Clark's request, the Placement Committee contacted the leadership of the Harvard Law School gay and lesbian student group, LAMBDA, to inform them of the situation and solicit their input regarding the Law School's response. See Exhibit 4.

18. According to the Dean, the Air Force granted Harvard Law School's request for more time to study the issue with a one-month extension, and on July 29, 2002, Dean Clark informed the Air Force of the Law School's decision to permit military recruiters to use the Office of Career Services that year and in future years. See Exhibit 4.

The Dean stated in the Memo that he was not anti-military:

> As a citizen, I am convinced that military service is both honorable and essential to the well-being of our country. I am deeply grateful for the sacrifices made by military personnel and the security and other benefits they provide to all of us. As Dean of Harvard Law School, I am also very proud of each and every graduate who has gone into military service, and I hope the number increases. Precisely because of this respect for military service, I believe that one way or another, all students should have access to these exceptional opportunities to serve their country.

Exhibit 4.

The Dean nevertheless sought to distance himself and the Law School from the military's discriminatory policies:

> Our hospitality does not imply that we endorse all of the military's personnel policies. The Law School condemns the military's discriminatory practices and remains committed to the principle of equal opportunity for all persons, without discrimination on the basis of sexual orientation. We are dedicated

> not only to the rule of law, but also to the advancement of just society.

Exhibit 4.

21. Dean Clark took the position that the decision to accommodate military recruiters was necessary because of the extraordinary impact a continued prohibition of recruiting through the Office of Career Services would have had on the University. At issue were not only the funds, but the fruits of those funds—students' educations, faculty's careers, significant medical and scientific research, and perhaps even cures to life-threatening diseases. See Exhibit 4.

22. The Dean remarked in his Memorandum that "some members of the community (especially our gay and lesbian students)" will endure "pain . . . because of the change in practice." He promised to work with LAMBDA, with other student groups, and with the faculty and administration "to discuss constructive measures that the Law School can take in support of its nondiscrimination policy." Exhibit 4.

23. The Dean closed his memo by expressing the hope that things would change:

> A society that discriminates on the basis of sexual orientation—or that tolerates discrimination by its members—is not a just society. I look forward to the day when the armed forces, like other employers who recruit at the Law School, adhere to the most basic fundamental principles of equal opportunity and nondiscrimination.

Exhibit 4.

24. On October 7, 2002, the date on or around the time military recruiters came to campus, I was among a

group of students and faculty who protested the military's presence at a rally on the steps of Langdell Hall, the main campus building.

25. Professor Janet Halley spoke at the rally. Her prepared remarks show her cynicism about the promises in Dean Clark's memo:

> Here's what I think has happened here at HLS and Harvard this summer and fall. The Bush Administration told Harvard that it was going to enforce a statute that allows it to cut off massive federal funds to the University unless the Law School waived enforcement of its sexual-orientation antidiscrimination policy, which till then had operated to keep JAG out of the official HLS recruitment program. University President Summers wanted the Law School to cave. . . . And so the Law School capitulated for him. As is happening all over America, our Dean is letting JAG on campus, in deference to a University President who is left politely off stage, while engaging in a compensatory celebration of gay identity and gay dignity. He's getting into bed with gay identity to commiserate about how terrible it all is. This rally, plus a few additional goodies thrown to LAMBDA, are ways in which gay identity makes this capitulation palatable, smooth, acceptable. This is a high price to pay.

A true and correct copy of Professor Halley's planned remarks are attached at Exhibit 5.

26. Professor Alan Dershowitz also spoke. He urged the Law School to challenge Solomon in court. He was quoted in an article covering the rally as saying:

> We are simply being told that if we continue to do the right thing . . . then other people will suffer as a consequence. That's just wrong. And it's so wrong that I think we ought to fight it in the courts. I think we ought to litigate this issue. I don't see the downside of litigating, of seeking at least a declaratory judgment in the courts. . . . Would it be worse to lose than not fight this fight? I don't think so. Better to fight the fight even there's a substantial risk of losing it because we will win it in the court of public opinion.

A true and correct copy of the article is attached at Exhibit 6.

27. Harvard Law student Adam Teicholz, then-President of LAMBDA and the rally organizer, heard Professor Dershowitz's statements as faculty support for litigation. He was quoted in the same article as saying, "It's a place full of lawyers . . . . But I think nobody really wanted to bring [talk of taking legal action against the government] out into the open until they were sure it would have strong faculty backing and I think Professor Dershowitz gave that today." Exhibit 6.

28. Some students challenged President Summers on the University's response to the military at a town hall forum in the Spring of 2003 convened to discuss the search for a new Law School dean. The Harvard Law School student newspaper, *The Record*, reported the comments of one student who expressed his disappointment that the former dean failed to challenge the military. He told President Summers:

> I feel the dean failed to represent all students . . . and that was a slap in the face because it told me

Harvard did not care if I went on to find a successful law career. I think Harvard University failed to protect all its students equally.

Exhibit 7.

29. I am not aware of any Harvard Law School students who joined the JAG Corps. at the end of the 2002-2003 academic year.

* * * * *

EXHIBIT 4 TO GERKEN DECLARATION

Harvard Law School allows military recruiters

MEMORANDUM

To: Harvard Law School Community
From: Dean Robert C. Clark
Date: August 23, 2002
Re: Military Recruitment

This academic year, for the first time since this School adopted a policy prohibiting discrimination on the basis of sexual orientation, the U.S. military will be allowed access to the facilities and services of the Law School's Office of Career Services ("OCS").

Because of the significance of this decision, I write to inform you of the history of this issue at the Law School and the path that led to this course of action.

At the outset, I would emphasize that the decision is the product of intense discussion and careful deliberation after the military raised the issue with new rigor this year. Regrettably, no reasonable alternative was available that could satisfy the disparate views on this issue. I have personally struggled with this issue, because I recognize the pain that some members of the community (especially our gay and lesbian students) will endure because of the change in practice. For many of us, a policy of nondiscrimination on the basis of sexual orientation reflects a fundamental moral value. There are numerous ways to express this value and pursue its implementation, however. Our decision to permit military recruiters access to the facilities and services of OCS does not reduce the Law School's

commitment to the goal of nondiscrimination on the basis of sexual orientation.

Our policy has long provided that any employer who recruits at Harvard Law School and utilizes the services of OCS must sign a statement indicating that it does not discriminate on various bases, including on the basis of sexual orientation. Because the military has not signed such a statement, it has not been permitted to utilize the services of OCS in the past.

At issue for several years, however, has been the interpretation of a federal statute commonly known as the Solomon Amendment. This statute, enacted in 1996, denies certain federal funds to an educational institution that "prohibits or in effect prevents" military recruiting. The regulations implementing the statute state that if an educational institution does not provide "requested access" to campus, the institution will lose its federal funds unless the institution can demonstrate "that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers." 32 C.F.R. 216.4(c)(3).

In 1998, the Air Force asked us for information to determine whether we were in compliance with the Solomon Amendment. I responded at that time by pointing out that the military has been able to recruit effectively at the Law School via a different route—namely, the Harvard Law School Veterans Association ("HLSVA"), a recognized student organization. As you may know, any official student organization at the Law School may invite any person or organization onto campus. HLSVA has invited military recruiters and has facilitated their efforts at HLS. In 1998, after I explained our nondiscrimination policy for OCS and the practice of having the military recruit through HLSVA,

the Air Force determined that we were in compliance with the Solomon Amendment.

In December 2001, the Air Force made another inquiry on the subject. Our initial response mirrored the response we sent in 1998. However, although our practices had no changed since then, apparently the Air Force's interpretation of the Solomon Amendment had changed. On May 29, 2002, the Air Force notified me that it no longer views our policy as being in compliance with the law. The Air Force's letter said that unless the School showed by July 1, 2002 that our "policies and practices had been modified to conform with federal requirements" they would "forward this matter to the Office of the Secretary of Defense with a recommendation of funding denial."

In light of the Solomon Amendment, our refusal to permit military recruiters access to the services of OCS would make the entire University ineligible for appropriations from the Department of Defense, Transportation, Health and Human Services, Education and related agencies. The Law School does not receive significant federal funding, and or participation in federally sponsored student loan programs would not be at risk. The University, however, annually receives approximately $328 million from the federal government, which comprises approximately 16% of its operating budget.

Because our recruitment practices have implications well beyond the Law School, I went outside (as well as inside) the Law School to discuss this issue. In summary, I studied the matter with the University's General Counsel extensively over the summer, and I consulted with Harvard's President. I also met with the Law School Placement Committee and took counsel

from other faculty members and senior administrators of the Law School. At my request, the Placement Committee contacted the leadership of HLS LAMBDA, to inform them of the situation and solicit their input to our response. In reply to our request for more time to study the issue, the Air Force granted us a one-month extension, and on July 29th I informed the Air Force of our decision to permit military recruiters to use OCS.

In the end, the decision to allow military recruiters on campus was necessary because of the extraordinary impact a prohibition of recruitment would have had on the University. I believe that an overwhelming majority of the Law School community opposes any form of discrimination based upon sexual orientation. At the same time, most of us reluctantly accept the reality that this University cannot afford the loss of federal funds. To say that the decision was just about money trivializes its impact. At issue potentially were the fruits of the federal funds—students' educations, faculty's careers, significant medical and scientific research, and perhaps even cures to life-threatening diseases.

As a citizen, I am convinced that military service is both honorable and essential to the well-being of our country. I am deeply grateful for the sacrifices made by military personnel and the security and other benefits they provide to all of us. As Dean of Harvard Law School, I am also very proud of each and every graduate who has gone into military service, and I hope the number increases. Precisely because of this respect for military service, I believe that one way or another, all students should have access to these exceptional opportunities to serve their country.

This year and in future years, the Law School will welcome the military to recruit through OCS. Our hospitality, however, does not imply that we endorse all of the military's personnel policies. The Law School condemns the military's discriminatory practices and remains committed to the principle of equal opportunity for all persons, without discrimination on the basis of sexual orientation. We are dedicated not only to the rule of law, but also to the advancement of a just society.

Going forward, I will be working with the leadership of LAMBDA and other HLS student organizations, and with our faculty and administrators, to discuss constructive measures that the Law School can take in support of its nondiscrimination policy. A society that discriminates on the basis of sexual orientation—or that tolerates discrimination by its members—is not a just society. I look forward to the day when the armed forces, like other employers who recruit at the Law School, adhere to the most basic fundamental principles of equal opportunity and nondiscrimination.

EXCERPTS OF LAW DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICA LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF SYLVIA A. LAW

I, Sylvia A. Law, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry at New York University School of Law ("NYU Law" or the "Law School"). I have been a member of the NYU Law faculty (the "Law Faculty") since 1973. In these thirty years, I have been attentive to issues of free speech, academic freedom, discrimination and equality. I make this declaration in my individual capacity as a member of the Law Faculty who has been witness to, and participant in, many of the facts I recount below. I do not speak for the Law School or the Law Faculty. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

2. In April 1977, the New York University Senate voted to include sexual orientation as a prohibited basis

of discrimination within the University itself. As amended, the Statement of Policy, applicable to the Law School, then read:

> New York University is committed to a policy of equal treatment and opportunity in every aspect of its relations with its faculty, students, and staff members, without regard to sex, sexual orientation, marital or parental status, race, color, religion, national origin, age or handicap.

3. The Law Faculty believes that the nondiscrimination policy was and is essential to the community's character and message. It is a declaration that invidious discrimination of any sort is immoral, including discrimination in employment decisions, and that human beings are to be judged on the merits of their accomplishments and ideas, and not on the basis of other unrelated characteristics.

4. The Law Faculty wanted more than just to pronounce the values in the nondiscrimination policy, it wanted to implement them in behavior that the Law Faculty hoped its students would follow in their law practices and lives as community leaders. In December 1977, the NYU Law School Placement Committee by a vote of 12 to 2 with 2 abstentions passed a resolution condemning discrimination in employment based on sexual orientation. That resolution stated:

> The NYU Law School is committed to a policy against discrimination in employment based on sexual orientation. The facilities of the Law School placement office [now the Office of Career Counseling and Placement or "OCCP"] shall not be available to employers whose practices are inconsistent with that policy.

A true and correct copy of this resolution is attached as Exhibit 1.[1] The Placement Committee requested that the Dean of the Law School pass that resolution on to the entire Law Faculty for its consideration and adoption.

5. The Law Faculty did vote to adopt the Placement Committee's resolution, and in 1978, NYU Law School became the first law school in the United States to deny access to placement services to employers who openly discriminate on the basis of sexual orientation. The 1978 policy was adopted over the opposition of the University Senate and Office of General Counsel.

6. In 1981, the Law Faculty applied the non-discrimination policy to an external actor, the Federal Bureau of Investigation. In a series of telephone conversations early that year, the NYU Law Office of Career Counseling and Placement ("OCCP") learned that the FBI would not hire homosexual Law School students or graduates. This practice was in direct conflict with the Law School's non-discrimination policy. Consequently, the OCCP responded by canceling all on-campus interviews conducted by the FBI. A true and correct copy of the letter from the OCCP canceling all on-campus interviews is attached as Exhibit 2.

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[1] In January 1978, the Placement Committee amended its resolution to state:

> The New York University School of Law is committed to a policy of equal treatment and opportunity in every aspect of its relations with its faculty, students, and staff members without regard to sex, sexual orientation, marital or parental status, race, color, religion, national origin, age or handicap. The facilities of the New York University School of Law placement office shall not be available to employers whose practices are inconsistent with that policy.

7. In 1990-91, a Chicago-based law firm was banned from on-campus recruiting because of a discriminatory question asked by that partner in an interview of a student at another law school.

8. In 1993, the Law Faculty voted to ban all Colorado law firms (or Colorado offices of national law firms) from on-campus recruiting to protest Colorado's passage of Amendment 2, which repealed existing, and prohibited future adoption of, Colorado statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. When the Supreme Court struck down Amendment 2 as unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996), the Law Faculty permitted Colorado employers to return to on-campus recruiting events.

9. The anti-discrimination policy passed by the Law Faculty does not operate as a one-way valve, however. In 1982, the Law Faculty permitted the Navy to return to on-campus recruiting for a time because the Navy was able to affirm that it did not discriminate on the basis of sexual orientation. True and correct copies of a letter from the Navy to the Law School and a Placement Committee Resolution are attached as Exhibit 3.

10. In 1995, Congress enacted the Solomon Amendment, denying Department of Defense funding to institutions of higher education that prevented the military from recruiting on campus. In response, the Law Faculty continued to insist that all potential employers seeking to recruit on campus conform to the school's nondiscrimination policy.

11. As reflected by the nondiscrimination policy, the Law Faculty does not promote, and does not want to be considered as supporting, discrimination in any form.

Because the military refused to abide by the nondiscrimination policy, the Law Faculty refused to allow military recruiters to recruit on the Law School's campus. The Law Faculty did not wish to promote discrimination and did not want to be seen as expressly or tacitly sponsoring discrimination. The nondiscrimination policy is intended to insulate the Law Faculty from any perception that it is condoning the employer's discriminatory policy or subsidizing or endorsing it in any way.

12. In 1997, Congress extended the rule denying federal funds to universities and sub-elements of universities that denied access to military recruiters to grants and contracts provided by the Departments of Labor, Health and Human Services, Education, and Transportation.

13. In April 1998, the Law Faculty responded to this new rule by reaffirming our 1978 policy. We appreciated that the consequence of our continued commitment to non- discrimination was loss of some federal funds, *i.e.* about $75,000 in 1998-1999. Because of the sub-element rule, our decision to put principle above money had no impact on the University as a whole. We continued our tradition of leading American legal education on this vital human rights issue.

14. In March 1998, the Law School received an inquiry from the Army asking for clarification of the Law School's and the University's policies regarding on-campus military recruiting. A true and correct copy of the Army's letter is attached as Exhibit 4.

15. Although it did not permit the military to use the Law School's OCCP facilities or resources or to come onto the Law School campus to recruit, at that time the

Law School did not prohibit in any way its students from obtaining employment with the military. As then-Dean John Sexton explained to the Army's JAG recruiter in an April 16, 1998 letter:

> NYU School of Law students have the opportunity to meet with representatives of the various departments of the military (DOD) during the semi-annual Career Fairs held in early September and early April. Arrangements can be made through the NYU Office of Career Services . . . The School of Law Office of Career Counseling and Placement maintains an extensive career resource library and DOD literature regarding career opportunities available to interested students. In addition, the career counseling staff have a list of NYU law graduates in recent years who have pursued careers in the military so that they can refer interested students to them.
>
> The NYU School of Law on-campus recruiting facilities are available to employers who sign our no-discrimination policy—our records indicate that the various Department of Defense entities have not signed this statement.
>
> * * *
>
> We are confident that NYU School of Law students have reasonable access to the employment opportunities offered by the various military departments and we will continue to refer interested students as we have in the past.

A true and correct copy of Dean Sexton's letter is attached as Exhibit 5.

16. And indeed as late as the fall 1998 recruiting season, this policy more than met the needs of the military JAG recruiters. After conducting off-campus interviews of NYU Law students in the fall of 1998, one Army recruiter wrote to the OCCP and reported that competition had become so keen for JAG attorney positions in the last few years that even "very qualified applicants will not be selected for a position." A true and correct copy of the Army recruiter's letter is attached as Exhibit 6.

17. In February 1999, the Army again conducted off-campus interviews of Law School students and sent another thank you note to the OCCP. A true and correct copy of the Army recruiter's thank you note is attached as Exhibit 7.

18. On January 13, 2000, the Department of Defense adopted interim regulations, effective immediately, to define an institution of higher education to include all sub-elements of such an institution, thus eliminating the pre-existing policy that treated schools and colleges within a university as independent actors for purposes of determining whether financial sanctions would be applied to universities at which one school or college excluded military recruiters.

19. As explained in an email from the Dean to the Law Faculty, on May 23, 2000, the University Office of General Counsel instructed the Law School to allow the military access to on-campus recruiting facilities and also make student contact information available to the military. The decision was based, at least in part, on the fact that the NYU Medical School received approximately three million dollars in funding from the Department of Defense which, under the new regulations, might have been jeopardized if the Law Faculty

continued to enforce its non-discrimination policy. The director of the OCCP was instructed to grant "parity of access" to the military with regard to on-campus recruiting facilities, without requiring that they sign the customary anti-discrimination assurance. A true and correct copy of the email from the Dean to the Law Faculty is attached as Exhibit 8.

20. Thus, on October 16, 2000, for the first time in 22 years, the Law Faculty—pioneers in believing and expressing that discrimination against gays and lesbians was a moral wrong—had to suspend its non-discrimination policy and permit an employer who openly discriminated access to the facilities of the OCCP.

21. During that first academic year of on-campus military recruiting, the military scheduled four visits but canceled one because there was no student interest. Each of the remaining three visits, including one during a February 2001 public interest jobs fair (known as the Public Interest Symposium), was marked by fierce student protests. Events that occurred at protests at the February Public Interest Symposium in particular were extremely harmful to the community. The Symposium was held at NYU and attended by participants from 23 area law schools. As the NYU Law students protested outside the area where the Marines were interviewing students, they were verbally assaulted and harassed by students from other schools who hurled anti-gay epithets at the protestors. There was even a physical altercation, resulting in one student from another law school being banned from returning for the second day of interviewing.

22. Each time the military recruiters came to campus, the OCCP posted "ameliorative" statements advising students that the military recruiters had not

signed the non- discrimination policy usually required by the Law Faculty. Other ameliorative measures include letters from the Dean and the faculty to the community, distribution of educational materials, protest resolutions by the Student Bar Association, educational programs, festooning the Law School with rainbow bunting, and faculty and staff distribution of rainbow ribbons to students. The OCCP continues these practices whenever the military comes to campus.

23. In that first year of on-campus military recruiting, 98 members of the Law Faculty signed an open letter sharing their concerns about the presence of the military on campus:

> [Participation of a discriminatory employer in on-campus recruiting] compromises not only our long-standing conception of the academic freedom of a faculty of law to determine appropriate ethical standards for the recruitment of our students, but conscripts us into complicity with policies that unjustly degrade fellow persons. All our collective experience with struggles for elementary justice under law suggests now, as much as ever, our ethical need to resist familiar attempts to divide people of good will from a sense of their common humanity.

That letter was republished in the fall of 2002 and now bears 119 signatures. True and correct copies of these letters are attached as Exhibit 9.

24. Another divisive event also occurred during that first year of on-campus recruiting. After three students with interest in the military interviewed at one of the visits, anonymous posters appeared around campus with pictures of the three students bearing captions

suggesting the interviewees were complicit in the military's discriminatory policy.

25. As a result of the disruption caused by the military's visits, in March 2001, it was decided to ask the military to conduct two discrete days of on-campus interviewing each year (so-called "military days"), once in the fall and once in the spring. On military days, the OCCP does not permit the military to use the OCCP interview center to conduct its interviews, as most employers would be able to do. The interview center is located near numerous Law School business offices, including admissions, financial aid, and the OCCP itself as well as student residences. The inevitable protests that would accompany the military's interviewing would too severely disrupt the functioning of those offices to permit the military to use the OCCP interview center. On military days, therefore, military recruiters interview students in a space not usually used for OCCP interview programs but still on the Law School premises.

26. It was also decided that the military should not participate in Early Interview Week, an on-campus recruiting process that takes place over five days in August during which 14,000 interviews occur involving 340 employers, 750 interviewers, and 650 interviewees. Usually 90% of NYU Law students obtain jobs through Early Interview Week. Early Interview Week is a huge logistical challenge and stresses the resources even of a school like NYU Law.

27. It was further decided that the military should not again participate in the Public Interest Symposium held in the spring. Generally, most government employers do not participate in Early Interview Week but attend the spring Public Interest Symposium. If the

military participated in either the fall Early Interview Week or the spring public interest job fair, however, the inevitable student protests would throw both of those critical recruiting processes into disarray and overstretch the resources of the OCCP.

28. On May 9, 2001, the OCCP informed the military of these conclusions.

29. As planned, the OCCP held two military days in the 2001-02 academic year. The military declined to attend the fall military day because no students signed up to interview. Nine students interviewed with the military at the spring military day, which again was marked by vociferous student protests. The student protestors pushed into the interview area and physically tried to keep interviewees from gaining entry. OCCP personnel and campus security were forced to assist interviewees through the protests in order to attend their interviews. The divisive effect of the military's on-campus presence was not limited to the duration of the protests. One student informed the OCCP Assistant Dean that she had stopped going to class because her assigned seat was near one of the most outspoken and violent military interviewees; she simply could not learn in the atmosphere of tension that existed between the two students solely because of the military's presence on campus.

30. Because of the protests, some of the military recruiters have offered to interview students off campus. One recruiter interviewed a student in a nearby restaurant after that student informed the recruiter that she was uncomfortable crossing the protest line. Another recruiter, who serves in the armed forces reserves, offered to interview interested students at his offices in New York City where he conducts his civilian

law practice. Another recruiter has offered to interview interested students who were willing to drive to the military base where she was stationed.

31. The military was apparently satisfied with the results of the spring 2002 military day. By letter dated February 15, 2002, the Army JAG Corps representative who attended the February recruitment event thanked the OCCP for the opportunity to interview interested candidates. The letter noted: "Competition has become very keen in the past few years for both our intern and JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position. Please relay to your students that non-selection does not reflect negatively on their qualifications." A true and correct copy of the Army recruiter's letter is attached as Exhibit 10.

32. Despite the surfeit of "very qualified applicants," some parts of the military were seemingly still unhappy with the military day accommodations made by the Law Faculty and continued to press for greater access to its recruiting processes. On information and belief, in late 2001 and again in late May 2002, the military threatened NYU with the loss of funds unless the Law Faculty allowed the military access to on-campus recruiting equal to that of a non-discriminating employer, despite the fact that the military did not, and does not, comply with our anti-discrimination policy. Upon information and belief, since December 2001, the military has continued and escalated its pressure on NYU and the Law School to grant the military recruiters unfettered access to Law School students for the purposes of recruiting.

33. On September 12, 2002, Dean Richard Revesz addressed the Law School community in an email

regarding the impending fall 2002 military day. Dean Revesz first assured the community that the Law School's non-discrimination policy was not an expression of anti-military bias. Rather, he wrote:

> For decades, America's top law firms and law schools have banned discrimination on the basis of sexual orientation, with the result that they are better able to fulfill their professional and educational tasks. . . . I recognize that this policy causes great pain to our gay, lesbian, bisexual and transgendered students. Further, it is deeply offensive to the great majority of those in the NYU Law School community that believe it is irrational and immoral to discriminate against qualified people because of their sexual orientation. . . .
>
> As NYU Law School recognized in 1978, a society that discriminates on the basis of sexual orientation —or that tolerates such discrimination against qualified people—is not just. I look forward to the day when the armed forces, like other employers who recruit at the Law School, adhere to principles of equal opportunity and nondiscrimination.

Dean Revesz the stated it was not his intention that the Law School simply surrender to the military; rather he stated "[g]oing forward, I am prepared to work with all student groups . . . and with faculty and administrators to discuss constructive measures that the Law School can take in support of its nondiscrimination policy." A true and correct copy of Dean Revesz' email is attached as Exhibit 11

34. By letter dated September 19, 2002, John Sexton President of the University directed Dean Revesz to "provide recruiters from the Armed Forces equal

access to the School of Law students and placement and career events and facilities as is afforded to other government agencies and civilian employers." President Sexton stated that he reached this decision because of the military's newly adopted position that the Solomon Amendment mandates "schools and colleges to accord military recruiters the same treatment and access to students as is accorded non-military employers recruiting on their campuses." Thus, he concluded he could not take the risk that the University would lose $130 million in federal funding, despite his belief that "a policy of nondiscrimination on the basis of sexual orientation reflects a fundamental moral value." A true and correct copy of President Sexton's letter is attached as Exhibit 12.

35. In the 2002-03 academic year, the OCCP again held two military days during which the military conducted on-campus interviews of Law School students. Again, each military visit was marked by student protests and solidarity demonstrations conducted by students, staff members, and faculty. In the 2003-04 academic year, the military is scheduled to interview on campus on October 17, 2003, and February 6, 2004.

36. Despite the ameliorative measures taken by NYU Law, the Law Faculty statements, and the Deans' letters to the Law School community, the Law Faculty's anti- discrimination message of common humanity and dignity has been garbled by the Solomon Amendment. One former NYU Law student, who came to NYU precisely because of its long history of clearly expressed commitment to dignity and equality, grew mistrustful of the Law School and lost belief in the sincerity of the Law School's expression of its anti-

discrimination beliefs. He voiced his confusion and concern in a letter to the Dean of the Law School:

> The message I have received over the last two years is that although sexual orientation has been listed in our non-discrimination policy for over two decades, gays and lesbians are *not* regarded as full and equal members of our community. They represent a segment of the law school community which is not deserving of the same level of protection in recruitment as other groups. The trauma suffered by this group as a result of attending a law school which is now an active instrument of their mistreatment and exclusion, is not regarded as something the law school needs to be very concerned about, except in the case where it might jeopardize its accreditation. The pain and suffering of all (and I do mean *all*—for we have all to some degree been poisoned by distrust, bitterness and disappointment that necessarily accompanies discrimination) members of this community are not sufficient enough to compel the dean's presence at any forum dedicated to address this issue. I would be very curious to see how the same situation would have been handled if it had been another 'protected' group's equality of opportunity at stake.

A true and correct copy of this student's letter is attached as Exhibit 13.

37. Another student, who was interested in interviewing with the military, reluctantly canceled his interview with a JAG Corps recruiter because of the pressure exerted on him by student groups not to participate in the on-campus interview process and his misperception that the OCCP disfavored students

applying for military jobs. He also expressed his frustration that students willing and able to serve their country were prevented from doing so by what he perceived as the military's refusal to conduct off-campus interviews of NYU Law School students.

38. The military's participation in on-campus recruiting seems to have had little effect on its ability to attract successful recruits from NYU Law. From the graduating classes of 1995 through 2001, before the Law Faculty excepted the military from its nondiscrimination policy, the armed forces hired six Law School graduates for permanent positions. Of course, none of these graduates was hired from on-campus recruiting. Additionally, the armed forces hired one summer intern during that time who likewise was recruited through off-campus interviewing. The military hired four graduates from the classes of 2002 and 2003, but only one of those graduates came to the military through the military's on-campus recruitment process.

39. Despite devoting considerable effort to amelioration, the adverse effects of allowing discriminatory recruiters to participate in on-campus recruiting events cannot be cured. We believe that the most effective way to communicate clearly our belief in the dignity, equality, and common humanity of all persons, regardless of sexual orientation, is to return to the Law Faculty's previous policy of excluding all discriminating employers, including the military, from the use of OCCP facilities, resources, and services. Were it not for the threatened loss of federal funds to the University, the Law Faculty would do so.

* * * * *

EXHIBIT 1 TO LAW DECLARATION

To: Norman Redlich

From: Howard Greenberger

The Placement Committee, by a vote of 12 to 2 with 2 abstentions, passed the following resolution at its meeting of December 1, 1977:

> The NYU Law School is committed to a policy against discrimination in employment based on sexual orientation. The facilities of the Law School placement office shall not be available to employers whose practices are inconsistent with that policy.

The Committee wishes to have this resolution presented at the next Faculty Meeting and recommends that the Faculty adopt it notwithstanding any other general University policy statements in this area.

EXHIBIT 3 TO LAW DECLARATION

DEPARTMENT OF THE NAVY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20360

26 May 1981

Mr. Michael Magness
Placement Director
New York University
School of Law
40 Washington Square South
New York, New York 10012

Dear Mr. Magness:

All hiring and advancement in the Office of the General Counsel is based on merit without regard to race, color, national origin, religion, age, sex, sexual orientation, handicap, political affiliation or marital status.

This statement is furnished per your request, so that we may interview at your University.

Thank you for your assistance.

Sincerely,

/s/ ROBINWYN D. LEWIS
ROBINWYN D. LEWIS
Assistant to the General Counsel

November 18, 1981

After review of the correspondence between the Placement Committee and the Assistant to the General Counsel of the Office of the General Counsel of the Department of the Navy and the official pamphlet of that office, entitle *Career Opportunities as a Civilian Attorney for the Navy* (NAVSO P- 3556, dated July 1981), the Placement Committee voted to permit the Office of the General Counsel of the Department of the Navy to interview on campus (In favor of the action: 7; opposed to the action: 0; abstaining: 1). This action is meant to apply solely to the Office of the General Counsel, Department of the Navy, and does not change our previous action barring the Judge Advocate General's Corps, Department of the Navy, from interviewing on-campus at New York University School of Law.

EXHIBIT 6 TO LAW DECLARATION

DEPARTMENT OF THE ARMY
UNITED STATES ARMY
LEGAL SERVICES AGENCY
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837

Seal REPLY TO ATTENTION OF: November 3, 1998

New York University School of Law
Ms. Irene Dorzback, Assistant Dean
40 Washington Square South
New York, New York 10012-1099

Dear Ms. Dorzback,

Thank you for posting on the email my scheduled trip to the New York area to interview law students interested in the US Army Judge Advocate General's Corps (JAG Corps). I am happy to report that two of my strongest candidates are students at NYU.

I was impressed with the qualifications and professional demeanor of all of the students at your school with whom I had the opportunity to speak. Competition has become very keen in the past few years for both our intern and our JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position. Please convey this information to your students and assure them that non-selection does not reflect negatively on their qualifications. This is especially true for the summer intern positions.

Again, on behalf of the Army JAG Corps, thank you for announcing my visit. I am looking forward to my next visit to New York in February, 1999, and hope that you will once again help publicize my presence.

Sincerely,

/s/ STEVEN H. LEVIN
STEVEN H. LEVIN
US Army, Judge Advocate
Recruiting Officer

EXHIBIT 7 TO LAW DECLARATION

Office of Counsel
3101 Park Center Drive
Alexandria, VA 22302-1695

U.S. ARMY AUDIT AGENCY

FAX

To: Irene Dorzback	From: Chad Sarchio
Fax: 212-995-7076	Pages: 4
Phone:	Date: 23 Feb. 99
Re:	cc:

☐ Urgent ☒ For Review ☐ Please Comment

☐ Please Reply ☐ Please Recycle

Comments:

Again, I appreciate all your time and efforts in assisting me with this round of interviews. Your students were a pleasure to speak with and have impressive credentials. Perhaps in the future "logistics" will become less of problematic.

Please place a copy of the following article in your resource folder for the Army JAG. I discussed it with several students, and it provides interesting insight into the JAG's "reputation" in the profession.

Thanks again for your help, and look forward to meeting you next fall if schedules permit.

EXHIBIT 9 TO LAW DECLARATION

[Seal] **New York University**
A private university in the pubic service

School of Law
40 Washington Square South
New York, New York 10012-10099

October 18, 2000

The Administration has informed the faculty that "for the first time in 22 years, an employer who openly discriminates against gay and lesbian people will be allowed access to the facilities of the Law School Placement program." The undersigned members of the faculty of the New York University School of Law write to share with you our concerns regarding this change of policy. We deplore the military policy that requires this change. It compromises not only our longstanding conception of the academic freedom of a faculty of law to determine appropriate ethical standards for the recruitment of our students, but conscripts us into complicity with policies that unjustly degrade fellow persons. All our collective experience with struggles for elementary justice under law suggests now, as much as ever, our ethical need to resist familiar attempts to divide people of good will from a sense of their common humanity.

[Signatures Omitted]

EXHIBIT 10 TO LAW DECLARATION

DEPARTMENT OF THE ARMY
UNITED STATS MILITARY ACADEMY
WEST POINT, NEW YORK 10996

[Seal] [Seal]
REPLY TO
ATTENTION OF

February 15, 2002

Ms. Irene Dorzback
Asst. Dean, Career Counseling & Placement
100 West 3rd Street
New York, NY 10012-1074

Dear Dean Dorzback,

Thank you for the opportunity to interview NYU students interested in the United States Army Judge Advocate General's Corps on February 8th. I appreciate your office's help in arranging the interviews. I was very appreciative of the welcome I received from your office, particularly under the circumstances.

Despite the protests, I feel the trip was a success. I was impressed with the qualifications and professionalism of those that interviewed. They all seemed well prepared for their interviews, which is a great reflection of your program.

Competition has become very keen in the past few years for both our intern and JAG attorney positions. Unfortunately, that means some very qualified appli-

cants will not be selected for a position. Please relay to your students that non-selection does not reflect negatively on their qualifications.

Again, on behalf of the Army JAG Corps, thank you for your hospitality.

Sincerely,

/s/ CRAIG E. MERUTKA
CRAIG E. MERUTKA
Major, U.S. Army
Field Screening Officer

EXHIBIT 11 TO LAW DECLARATION

TO: Law School Community

FROM: Richard Revesz

DATE: September 12, 2002

RE: Military Recruiting and Discrimination Against Gay and Lesbian People

On October 18, 2002, recruiters from the U.S. Department of Defense (DOD) will use the Law School's Office of Career Services to interview students seeking employment opportunities. Military policy excludes qualified applicants who are openly lesbian, gay, bisexual or transgendered.

We are proud that in 1978, NYU Law School became the first law school in the United States to deny its placement services to employers who discriminate on the basis of sexual orientation, in addition to earlier policies that prohibited discrimination on the basis of race, gender, religion, national origin or disability. In response to the leadership of NYU Law School's former Dean John Sexton, in 1990 the Association of American Law Schools resolved that accredited law schools in the United States could not aid employers who discriminate on the basis of sexual orientation.

The anti-discrimination policies of NYU and other U.S. law schools are not targeted at the military, but they apply equally to all employers. Our anti-discrimination policies reflect no disrespect for the military or its lawyers. It is in no way unpatriotic. For decades, America's top law firms and law schools have banned discrimination on the basis of sexual orientation, with the result that they are better able to fulfill their professional and education tasks. Further, the

Office of Career Counseling and Placement provides information about off-campus interviews for students who seek job opportunities with the military.

Since 1995, the federal Solomon Amendment has denied DOD funds to schools that do not allow military recruiters. Because NYU Law School receives no funds from the DOD, that posed no problem for us. In 1997, Congress expanded the Solomon Amendment to deny funding from the Departments of Labor, Health and Human Services, Education and Transportation to schools that do not allow military recruiters. Despite the loss of $75,000 in Federal Pell Grants, NYU Law School reaffirmed our anti-discrimination principle and continued to deny access to discriminatory recruiters. When our own law school money was on the line, we were willing and able to support principle on this vital human rights issue.

In 2000, the DOD reinterpreted federal law to say that if any part of a university denied access to military recruiters, the entire university would lose all federal funds. Other parts of NYU receive substantial federal funds. NYU, through its Office of General Counsel, instructed the Law School to comply with the DOD demands, to suspend our general anti-discrimination policy and allow the military access to on-campus interview services of the Office of Career Counseling. Out of concern for the funding needs of the important, federally funded work of our colleagues in other schools, we have compiled with the instruction from the University.

I recognize that this policy causes great pain to our gay, lesbian, bisexual and transgendered students. Further, it is deeply offensive to the great majority of those in the NYU Law School community that believe

it is irrational and immoral to discriminate against qualified people because of their sexual orientation.

Going forward, I am prepared to work with all student groups, including SQUAD and OUTLAW, and with faculty and administrators to discuss constructive measures that the Law School can take in support of its nondiscrimination policy.

The Placement Committee has organized a program, "Military Discrimination Against Gay and Lesbian People: NYU Law School's Responses," which will take place Monday, September 23, at 4:00 p.m., in Room 210. Prof. David Richards will moderate a panel that includes Richard McKewen, '01, Peyton McNuff, '02, and Robert Sweeney, '02. The panel of recent law school graduates has studied these issues in an academic context and provided important moral and political leadership in the Law School.

On October 18, when the military recruiters are on campus, the Law School will offer members of the community a simple means to express disapproval of the military policy. Ribbons will be available at the Guards' Desks in Vanderbilt and in the School's offices at Butterick for those who would like to affirm opposition to discrimination against gay, lesbian, bisexual and transgendered people.

As NYU Law School recognized in 1978, a society that discriminates on the basis of sexual orientation —or that tolerates such discrimination against qualified people—is not just. I look forward to the day when the armed forces, like other employers who recruit at the Law School, adhere to principles of equal opportunity and nondiscrimination.

EXCERPT OF MALIGNO DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ___

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF THOMAS MALIGNO

I, Thomas Maligno, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Director of Career Development at Touro College Jacob D. Fuchsberg Law Center. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

2. In November, 1994, the Touro faculty voted to formally adopt a single uniform statement of the school's non-discrimination policy. The minutes from that meeting state:

> "Non-Discrimination Policy.
> Professor Eileen Kaufman noted that, while the school has a non-discrimination policy, which is expressed in various publications, she had been unable to find a single uniform statement of the policy.

After a brief discussion, the following statement was adopted unanimously:

> It is the policy of Touro College Jacob D. Fuchsberg Law Center not to discriminate on the basis of race, color, religious, national origin, sex, age, handicap or disability, marital status, or sexual orientation. This policy applies to admissions policies, educational programs, employment practices and other activities sponsored by the Law Center. The Law Center complies with all applicable federal, state and local laws relating to discrimination, and engages in affirmative action efforts to provide a full opportunity for the study of law and entry into the profession by qualified members of groups that have been victims of discrimination in the past."

3. In 1997, Congress extended the rule denying federal funds to universities and sub-elements of universities that denied access to military recruiters to grants and contracts provided by the Department of Labor, Health and Human Services, Education, and Transportation. In October, 1997, Touro Law School responded to this new rule by reaffirming our policy. In the course of the discussion Dean Glickstein indicated that, even if the faculty voted to reaffirm its policy and continue to bar military recruiters, he might be obliged, on advice of College counsel, to permit the military to conduct interviews at the Law School.

4. In a January 1998 letter to the faculty Dean Glickstein wrote, "I discussed the issue with President Lander, advised him of the strong views of our faculty, and told him that I concur in condemning the military's discrimination on the basis of sexual orientation. President Lander was deeply concerned about possible dam-

age to the Law School's fiscal health and jeopardizing public funding for our Central Islip move. He directed that we grant the military's request to conduct interviews at the Law School. I want to emphasize that this concession does not diminish the Law School's commitment to nondiscrimination based on irrelevant personal characteristics. We are opposed to discrimination based on sexual orientation and welcome persons to our community regardless of their sexual orientation. As George Washington said in writing to the congregation of the Touro Synagogue in Newport, Rhode Island:

"To bigotry no sanction. To persecution no assistance."

5. In 1998, when military recruiters came on campus at Touro, they met with large boisterous protests. Although the protests were peaceful and lawful, many students were so intimidated by having to confront this uncomfortable situation that they decided not to purse the interview process (during this time our Career Planning Office was always supportive of the students and their right to interview). The students' reluctance to participate in future on-campus military recruitment led the staff of the Career Planning Office to seek an alternative location. We realized that many of our students wanted the opportunity to interview with and work for the military.

6. While all other on-campus interviewing was conducted at the Law Center, in 1999, 2000 and 2001 our military interviews were held at the offices of the Family Service Association, a respectable not-for-profit that is five minutes from the Law Center. This is an agency where many of our clinical and pro bono students represent clients on legal matters, therefore not foreign to Touro.

6.1 The Family Service Association building was chosen for its relationship with and proximity to the Law Center.

6.2 While using the Family Service Association, our Career Planning Office had informed all military recruiters that we were requesting, but not demanding that they conduct interviews at Family Service. All had agreed and the process appears to have worked for all concerned.

6.3 We avoided the "intimidation" atmosphere that has developed at other schools and our students expressed their appreciation for that. We believe the number and quality of our students participating in military recruitment spoke for itself and that the alternative site was at least equal in quality and scope to the access provided to other employers.

6.4 All military recruiters were welcomed in the Law Center building, meeting a CPO staff member to prepare for the interviews. In addition, all military recruiters were invited to have lunch with CPO staff (and at times professors), at the school or in a restaurant and many have accepted our invitation.

7. In December 2001, Touro College President, Bernard Lander, received an inquiry from the Army asking for clarification of the Law School's and the University's policies regarding on-campus military recruiting. See exhibit 1.

8. In December 2001, Dean Glickstein responded on behalf of the Law School:

In that letter, the Dean wrote that although we believed it was best for military interviewing to occur off

campus we would comply with the military recruiters requests to interview on campus. See exhibit 2.

9. In a May 2002 letter from the office of the Judge Advocate General, Dean Glickstein was informed that Touro would only be considered in compliance if military recruitment occurred on campus. See exhibit 3.

10. In 2002, all military recruitment did occur on Touro's campus.

11. The enclosed article describes Touro's response to these 2002 on campus recruitment visits. See exhibit 4.

12. In 2003, for the 2nd year in a row, the Law School suspended its non-discrimination policy and will permit military recruiters to conduct on-campus interviews of law students. These interviews are set for October 2003.

* * * * *

EXHIBIT 2 TO MALIGNO DECLARATION

December 20, 2001

Daniel B. Fincher, Colonel, USAF
HQ USAF/JAX
1420 Air Force Pentagon
Washington, D.C. 20330-1420

Dear Colonel Fincher:

Dr. Bernard Lander has asked me to respond to your letter regarding Touro Law Center's policy with respect to military recruiting on campus. We appreciate this opportunity to clarify our policy.

Our Career Planning Office has long enjoyed a positive working relationship with our Air Force Recruiter. This is also true of our relationship with the other branches of the service that recruit Touro students. This productive relationship has resulted in many Touro Students participating in the military recruitment process. Over the past few years, the process has also resulted in Touro students being offered and accepting positions with JAG and in the JAG summer programs. They include Peter D. Galindez, Michael Larson, Byron Divins, Joseph Fairfield, Michael Kanabrocki, Darren Wall, David Lee Willson, Larry Mark Dash, and Carla A. Simmons.

Touro's policy concerning military recruitment was developed to provide students who are interested in interviewing a convenient productive process.

As you are aware, military hiring practices have been controversial on law school campuses across the country. In 1998, when military recruiters came on campus at Touro, they met with large boisterous protests.

Although the protests were peaceful and lawful, many students were so intimidated by having to confront this uncomfortable situation that they decided not to pursue the interview process. (during this time our Career Planning Office was always supportive of the students and their right to interview.) The students' reluctance to participate in future on-campus military recruitment led the staff of the Career Planning Office to seek an alternative location. We realized that many of our students wanted the opportunity to interview with and work for the military.

While all the other on-campus interviewing is conducted at the Law Center, our military interviews are held at the offices of the Family Service Association, a respectable not-for-profit that is five minutes from the Law Center. This is an agency where many of our clinical and pro bono students represent clients on legal matters, therefore not foreign to Touro.

The Family Services Association building was chosen for its relationship with and proximity to the Law Center.

Since first using the Family Service Association, our Career Planning Office has informed all military recruiters that we were requesting, but not demanding, that they conduct interviews at Family Service. All have agreed and the process appears to have worked for all concerned.

We have avoided the "intimidation" atmosphere that has developed at other schools and our students have expressed appreciation for that. We believe the number and quality of our students participating in military recruitment speaks for itself and is evidence that the

alternative site is at least equal in quality and scope to the access provided to other employers.

All military recruiters are welcomed in the Law Center building, meeting a CPO staff member to prepare for the interviews. In addition, all military recruiters are invited to have lunch with CPO staff (and at times professors), at the school or in a restaurant and many have accepted our invitation.

As you are aware, the AALS requires law schools to maintain that employers who interview at law schools sign a non-discrimination pledge. Since the military cannot do so, due to congressional mandate, the AALS requires ameliorative action to be taken when the interview occurs. We are aware that at other schools the actions include programs, teach-ins and demonstrations critical of the military. These actions are accompanied by posters throughout school buildings and buttons worn by students and faculty, also critical of the military hiring practices. Although we are prepared to adopt these measures (as AALS requires) should you insist on interviewing on campus, we believe our current practice meets the requirement of 32CFR 216.4 (c)(3) while simultaneously satisfying our students desire to have a dignified, productive interview process.

Touro has never trivialized the process like other schools that have set up separate military interview sites miles from campus, in remote inaccessible locations in unattractive out of the way places or in leaky basements. FSL was thoughtfully chosen because of its proximity to campus, its relationship to the school and the quality of the space available.

We are proud of our alumni who have served in the JAG Corps. I am sending you a photocopy of a page

from our latest alumni magazine. As you can see, it prominently features two of our alumni presently serving in the JAG Corps.

You can be assured that at all times military recruiters and prospective interviewees are treated with as much dignity and respect as all employers by our CPO staff. It is for these reasons that we believe that we are in compliance with the regulations concerning military access to our school and students. It is our desire to comply with these regulations.

Shortly after the New Year, the Vice Dean of the Law Center, Gary Shaw, will call you to follow up on this matter. He will be glad to discuss your concerns and make sure that you are satisfied with the arrangements that we have made. I hope that you will agree that we are in compliance with the regulations concerning military access to our school and students.

Sincerely,

Howard A. Glickstein
Dean

EXHIBIT 3 TO MALIGNO DECLARATION

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, DC

29 May 2002

HQ USAF/JAX
1420 Air Force Pentagon
Washington, DC 20330-1420

FEDERAL EXPRESS

Dean Howard A. Glickstein
Touro College of Law
300 Nassau Road
Huntington NY 11743-1239

Dear Dean Glickstein

This replies to your letter dated 20 December 2001, which responded to our earlier request that you clarify your institution's policy regarding military recruiting on your law school campus.[1] Based on your letter and our conversation, if the law school allows military recruiters to interview at the law school, your institution will be in compliance with federal law with respect to equal access to your law school for military recruiting.

We are fully aware of the ameliorative actions that the Association of American Law Schools encourages law schools to take in opposition of the federal law and regulations that allow military recruiting. Ameliorative actions that intimidate interested students and, in effect, prevent military recruiting on campus would be contrary to requirements of the law.

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[1] Letter dated 17 December 2001.

We appreciate your cooperation and support and look forward to working with you, your school, and your students in the future. If you have any questions, please contact us at (703) 614-3021.

Sincerely,

/s/ DANIEL B. FINCHER
DANIEL B. FINCHER, Colonel, USAF
Chief, Professional Development Division
Office of The Judge Advocate General

cc: Dr. Bernard Lander

EXCERPTS OF MASTASAR DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF RICHARD MATASAR

I, Richard A. Matasar, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Dean and President of New York Law School ("NYLS" or the "Law School"). I have been Dean and President here since 2000. Prior to that time, I have served as the Dean and Levin, Mabi & Levin Professor of Law at University of Florida Fredric G. Levin College of Law, Dean and Professor of Law at Chicago-Kent College of Law, and Associate Dean for Academic Affairs and Professor of Law at the University of Iowa College of Law. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief.

2. I make this declaration in my personal capacity, not as a representative of NYLS.

NYLS and September 11, 2001

3. NYLS sits at the intersection of Worth and Church Streets in lower Manhattan. The campus is just eight blocks from the former World Trade Center site.

4. No other law school in the United States bore the brunt of the catastrophic events of September 11, 2001 quite like NYLS.

5. As the towers crumbled on September 11 and the world changed, I wrote a letter, disseminated then and now posted on NYLS' website, to the Law School community:

> It is with great sadness that I write this message. As I look out of my office window I can see the smoke and debris from the Trade Towers. There is no worse feeling than the helplessness that comes from being close, but unable to help. Many of us have colleagues, family, and friends who work in the Towers. We are fearful that they may be lost, grateful for the escape of others, and thankful for the tireless efforts of the rescue workers.

A true and correct copy of my letter as it appears on the NYLS website is attached as Exhibit 1.

6. In the midst of the devastation, I looked forward to the future I would face as a teacher, lawyer, and citizen:

> Our country and profession will be challenged in unprecedented ways. Our emotions cannot and should not be checked. Rather we must channel them to do what is right. We will be challenged by changes in our civil life—security measures, inconveniences to daily living, fear, and pleas for revenge. My hope is

for our leaders to show courage, and to respond swiftly and in a measured way. For the rest of us—New Yorkers, Americans, and all members of the legal profession-let us use every tool at our disposal to help bring our community together to respond to a shared national catastrophe.

Exhibit 1.

7. A few days later, as the full impact of the devastation began to sink in for us, I again addressed this community, in a letter that is also now posted on the NYLS website:

Our world has been shattered. All of us have suffered incalculable losses-of family, friends, colleagues, and fellow citizens. The peace that we have come to expect as our birthright has been broken, perhaps forever. Nothing any of us can say or do can restore what was; we only can look forward and do what we can to come back stronger than ever. Our Mayor certainly has it right: Americans and New Yorkers are tough and compassionate people, dedicated to moving forward, rebuilding, and safeguarding our democratic values even in the face of the most difficult challenges.

* * *

What separates our society from others is our extraordinary commitment to the rule of law. Over the next few months our most cherished beliefs will be challenged. We must resolve to double our efforts (and then double them again) to bring order out of chaos and use every legal means to find and then punish those responsible. More fundamentally, as members of a helping profession, we must do all

we can to bring our community back as strong as ever. I often say that at New York Law School we "Learn Law and then Take Action." Now is our time to do both.

A true and correct copy of this letter as it appears on the NYLS website is attached as Exhibit 2.

8. NYLS was closed for two weeks after the September 11 attacks. When classes resumed Professor Nadine Strossen addressed her students in a statement, excerpts of which are found on the NYLS website:

> Along with other leaders of the ACLU—and an unprecedentedly broad, diverse coalition we organized of other groups from across the political, religious, and ethnic spectrum—I have been working with government officials to ensure that we who have the good fortune to live in this great city, and in this great country, can continue to enjoy both safety and freedom. Our paramount concern for protecting human life should not—and need not—come at the cost of fundamental human rights for everyone in this country, including non-citizens, and including people of every ethnic and religious background.
>
> As you know, many important issues of constitutional law are now affecting our lives more directly, and differently, since the horrific September 11 attacks. Since September 11, I have been addressing these issues non-stop with civil rights leaders, government officials, and media representatives. I look forward to discussing them with my students in the courses I'll be teaching next semester, Constitutional Law II and Advanced Constitutional Law & Appellate Advocacy. I also look forward to seeing and talking with many of you this semester.

A true and correct copy of Professor Strossen's comments as they appear on the NYLS website is attached as Exhibit 3.

9. On the sixth-month anniversary of September 11, I reflected in another statement to the NYLS community:

> We understand to the core that we may be knocked down, but we can get up and move forward. We know that our voices cannot be silenced, that patriotism does not mean giving up cherished liberties, and that supporting our leaders means cheering them when they are right, questioning them when we do not understand, and criticizing them when they are wrong.

A true and correct copy of my statement as it appears on the NYLS website is attached as Exhibit 4.

10. Despite initial feelings of helplessness, NYLS faculty, staff, and students found ways to help. The NYLS community dedicated itself to assist in rebuilding the city after the events of September. To channel its efforts to help the many in the community who had suffered economic hardship and dislocation as a result of the attack on the World Trade Center, the Law School established the New York Law School Community Fund. Contributions were made by faculty, staff, and students. And even before the resumption of classes, members of the Law School community committed themselves to an active public service response. Associate Dean Stephen Ellmann organized a coalition of clinical law teachers, members of the bar, and leaders of public interest organizations to identify public-service legal needs arising from the disaster. The Law School developed two programs to help small busi-

nesses and families deal with legal problems connected to the attack. Throughout the months that followed, NYLS made its resources available to displaced lawyers from the community and to various community organizations.

NYLS And Non-Discrimination

11. The values I expressed along with Professor Strossen—the importance of adherence to principle, the need to stand up for cherished beliefs, the value of skepticism and principled dissent, and a strong commitment to the enforcement and protection of fundamental human rights—in the wake of September 11 run deep at NYLS. They are integral to our educational mission.

12. My statement to prospective students posted on the NYLS website captures these values:

> We have a deep commitment to innovation, diversity, and integrity that calls for students devoted to becoming true professionals.
>
> * * *
>
> New York Law School students and faculty are passionately devoted to using law as a tool to improve the justice system, make our government stronger, and ensure that the economic system functions effectively and fairly. We say: "Learn Law. Take Action."
>
> * * *
>
> Law and justice are meant to go together. . . . At New York Law School, issues of justice are at the core of our mission; our students must be willing to accept the challenge of more clearly defining a just

> system. We teach technique; we also kindle spirit and foster devotion to professional ideals. Our imperative should be that of every lawyer: take good intentions and make them a way of life.

A true and correct copy of my statement to prospective students as it appears on the NYLS website is attached as Exhibit 5.

13. I know that it is critically important to nurture an environment in which each student feels welcome, will thrive, and will enrich the intellectual community through active participation. A key to that environment is our uncompromising adherence to the principle that all those who engage in discourse within the community are fully equal, and must be judged on the basis of their character, merits, and accomplishments, and not on the basis of race, creed, color, religion, national origin—or sexual orientation. As an educator, I know that, by communicating through word and deed to students, a law school can create an environment that reflects the values of equal participation and non-discrimination that are critical to the educational mission.

14. NYLS has long repudiated discrimination on the basis of race, color, religion, gender, sexual orientation, marital or parental status, national origin, age or handicap. The faculty, the pedagogical leaders of the Law School, instituted this policy. The rationale of a non-discrimination policy is that no person should face discrimination for a personal attribute—whether race, religion, sexual orientation, or other characteristic—that has no bearing on an individual's internal worth, the quality of his or her mind, or his or her ability to succeed in a particular post or assignment. Indeed, individuals with a diversity of backgrounds enrich the discourse and educational energy in a classroom and

throughout the institution. Such individuals will not participate freely unless their school accords them equal respect, dignity, and protection from discrimination.

15. Non-discrimination is a touchstone for every aspect of academic, social, cultural and political life at NYLS. The non-discrimination policy governs admissions, scholarships, grades, and staff and faculty hiring and promotion.

16. Starting in 1983, NYLS faculty expressed and lived out its commitment to non-discrimination by instituting a policy that the facilities of the Office of Career Services would be available only to employers whose practices are consistent with that policy of non-discrimination. I believe that abetting a discriminatory employer's recruiting efforts undermines the values of the Law School. The military, as a discriminatory employer, could not use the facilities of NYLS Office of Career Services throughout the rest of the 1980s and most of the 1990s.

17. NYLS' non-discrimination policy does not reflect disrespect or disregard for the military—no law school in the nation is more painfully aware than NYLS of the importance of national security—but rather an affirmation that qualified applicants should be judged on their merits, rather than on factors unrelated to their ability to perform their jobs. This policy is also of the greatest importance because of the central role the American legal profession plays in the functioning of American democracy which rests on the rule of law, at the heart of which is the constitutionally guaranteed promise of equal protection of the laws. As I put it in a statement to the NYLS community that now appears on the NYLS website: "in the view of America's law

schools, the institutions charged with educating legal professionals, [the military's discriminatory hiring practice] is wrong as applied to the hiring of lawyers." A true and correct copy of my statement to the NYLS community as it appears on the NYLS website is attached as Exhibit 6. This non-discrimination policy expresses the commitment to, and support for, the notion that the American legal profession must be open to all Americans who have the desire and ability to be lawyers.

NYLS And The Solomon Amendment

18. In 1997, the military actively used the Solomon Amendment to threaten law schools with a loss of federal student financial aid. An associate dean at NYLS estimated that the potential loss to the Law School's students was $2.1 million and that there was no way that NYLS could absorb that loss. In November 1997, NYLS faculty therefore voted to suspend the application of the non-discrimination policy to the military, which started on-campus interviewing. In January 2000, after federal student financial aid was removed from the scope of the Solomon Amendment, the faculty voted to resume full enforcement of the non-discrimination policy and exclude the military from on-campus recruiting.

19. After September 11, 2001, the military intensified its efforts to recruit on law school campuses, relying again on the threat of the Solomon Amendment. In December 2001, the Department of the Army informed me by letter that "military recruiting personnel have been inappropriately limited in their ability to recruit or have been refused student recruiting information at" NYLS. A true and correct copy of this letter is attached as Exhibit 7.

20. After a response from NYLS' Office of Career Services, the Department of the Army again wrote me in May 2002 to tell me: "Based on your letter and reports from our field screening officers, we believe that your institution is not complying with federal law and regulations with respect to access to your law school for military recruiting." True and correct copies of NYLS' Office of Career Services' response and the Army's May 2002 letter are attached as Exhibits 8 and 9. The Army advised:

> In particular, the following information indicates that your institution is not in compliance with federal requirements:
>
> a. New York Law School has an institutionalized policy that limits military recruiting.
>
> b. New York Law School does not allow military recruiters to recruit on its campus and does not provide military recruiters access to the services provided by the Office of Career Services.

Exhibit 9. The Army threatened:

> Unless we receive new information from you . . . showing that policies and practices of your institution have been modified to conform with federal requirements, or that the above information about your school is incorrect, we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial.
>
> I regret that this action may have to be taken; however, as provided in federal law it is imperative that the Department of Defense recruiters have reasonable access to your law school campus.

Exhibit 9.

21. In the post-September 11 era, the Solomon Amendment's "scarlet letter"—publication of the names of non-compliant schools in the Federal Register —was too great a stigma. NYLS' longstanding commitment to expressing and living out its core principle of non-discrimination through the consistent and principled application of its non-discrimination policy crumpled. Even the resolve—tested by the events of September 11—to stand up for cherished beliefs, to express principled dissent, and to protect fundamental human rights gave way.

22. In September 2002, NYLS' Assistant Dean for Career Planning wrote the Army:

> Since 1983, New York Law School has included sexual orientation as a prohibited basis for discrimination. The School welcomed in 1990 the Association of American Law Schools' expansion of its non-discrimination policy to protect sexual minorities. As Americans, we are disheartened that our military, which is entrusted with the defense of the country, follows a policy that explicitly discriminates against gay and lesbian service members because it is demeaning, begets violence, and diminishes the strength of our armed forces.
>
> New York Law School's policy and that of the AALS, was never intended to be anti-military. It was intended to be anti-discriminatory. The New York Law School faculty have consented to suspend the application of our Career Services policy to allow military recruitment of our students at this time.

A true and correct copy of the Assistant Dean's letter is attached as Exhibit 10.

23. In October 2002, recruiters from the United States armed services were allowed on the NYLS campus to interview students and make presentations regarding employment with their Judge Advocate General's offices.

24. In advance of that occasion, I again addressed the concerns of the Law School community, attempting to reassure the community: "This decision in no way reflects a weakening of commitment to principles of non-discrimination. I personally believe that the military's discriminatory policies are demeaning, promote violence and diminish the strength of the armed forces, and I know that many members of the New York Law School community share that view." Exhibit 6.

25. I continued, reaffirming the critical importance of inculcating NYLS students with the "core principle of non-discrimination."

> Every lawyer must realize that invidious discrimination within the profession weakens the institution that is charged with preserving government of, for and by the people. While many legal educators have worked and continue to work to change the policy mandated by Congress, the need for and importance of an inclusive legal profession is independent of the current state of statutory law. New York Law School . . . reiterates in the strongest terms that discrimination on any of the grounds set forth in its non-discrimination policy is a disservice to the profession and to the rule of law.

> *The School reminds every member of the community, irrespective of political or ideological views, that the core principle of non-discrimination in legal employment is at the heart of the task of educating the next generation of American lawyers.*

Exhibit 6 (emphasis supplied).

26. NYLS' suspension of its non-discrimination policy as it applies to the military continues to this day, causing a constant ongoing harm. For example, my students have expressed to me the pain and dismay they feel when they see an employer that devalues them or their fellow students force its way onto campus. Another student, a commissioned infantry officer in the New York Army National Guard, wrote an op-ed piece published in the school newspaper to criticize what he perceived as NYLS' failure to adhere to principle: "Veterans would respect you more for sticking with your convictions (like the BLGLSA [the NYLS bisexual, gay and lesbian student group] has), rather than to 'pussyfoot' around controversies your convictions would raise . . . ." A true and correct copy of this op-ed is attached as Exhibit 11.

27. These harms to the Law School community and others resulting from the Solomon Amendment will only be alleviated if the Law School can set its policies based on its institutional values rather than in response to outside coercion.

* * * * *

EXCERPT OF EXHIBIT 9 TO MATASAR DECLARATION

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

May 29, 2002

Reply to Attention of

Personnel, Plans, and Training Office

Richard A. Matasar
President, New York Law School
57 Worth Street
New York, New York 10013-2960

Dear Mr. Matasar:

This replies to Ms. Lori Freudenberger's letter dated January 8, 2002, which responded to our earlier request that you clarify your institution's policy regarding military recruiting on your law school campus. Based on your letter and reports from our field screening officers, we believe that your institution is not complying with federal law and regulations with respect to access to your law school for military recruiting. In particular, the following information indicates that your institution is not in compliance with the federal requirements:

a. New York Law School has an institutionalized policy that limits military recruiting.

b. New York Law School does not allow military recruiters to recruit on its campus and does not

provide military recruiters access to the services provided by the Office of Career Services.

* * * Unless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements, or that the above information about your school is incorrect, we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial.

I regret that this action may have to be taken; however, as provided in federal law it is imperative that Department of Defense recruiters have reasonable access to your law school campus.

* * * * *

Sincerely,

/s/ CLYDE J. TATE II
CLYDE J. TATE II
Colonel, U.S. Army
Chief, Personnel, Plans,
and Training Office

EXCERPT OF EXHIBIT 10 TO MATASAR DECLARATION

Margaret E. Reuter
Assistant Dean for Career Planning
57 Worth Street, New York, NY 10013-2960
T 212-431-2345 F 212-274-1491
mreuter@nyls.edu
www.nyls.edu

September 30, 2002

Colonel Michelle Miller
United States Army
Office of the Judge Advocate General
1777 North Kent Street
Rosslyn, VA 22209-2194

Dear Colonel Miller:

* * * I am writing to notify the Army of the availability of our Career Services Office to facilitate recruitment of our students.

New York Law School has long required employers wishing to use our career services facilities to abide by our non-discrimination policy. That policy states:

> New York Law School is committed to a policy which prohibits discrimination in employment based on sex, sexual orientation, marital or parental status, race, color, religion, ethnic or national origin, age or handicap. The Office of Career Services facilities are available only to employers whose practices are consistent with this policy.

Since 1983, New York Law School has included sexual orientation as a prohibited basis for discrimination. The School welcomed, in 1990, the Association of

American Law Schools' expansion of its non-discrimination policy to protect sexual minorities. As Americans, we are disheartened that our military, which is entrusted with the defense of our country, follows a policy that explicitly discriminates against gay and lesbian service members because it is demeaning, begets violence, and diminishes the strength of our armed forces.

New York Law School's policy and that of the AALS, was never intended to be anti-military. It was intended to be anti-discriminatory. The New York Law School faculty have consented to suspend the application of our Career Services policy to allow military recruitment of our students at this time. New York Law School continues to be disturbed by the military's employment practices and will use other means to voice our criticisms.

Sincerely,

/s/ MARGARET E. REUTER
MARGARET E. REUTER
Assistant Dean for Career Planning

cc: Dean Richard Matasar
Lieutenant Colonel Chris DeToro

EXCERPT OF MAY DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF GERALD MAY

I, Gerald V. May, III, declare pursuant to 28 U.S.C. § 1746, as follows:

1. I am currently a student at Boston College Law School ("BC Law" or "the Law School"). If called as a witness, I could and would testify to the following based on personal knowledge or, if indicated, based on information and belief.

2. As a new law school student, I approached the start of my BC Law career with a sense of excitement and optimism. Coming from a liberal arts college with a commitment to diversity, I looked forward to working in another open environment where I could interact with and learn from people with different backgrounds and perspectives. Because of its strong emphasis on tolerance, inclusiveness, and respect for the dignity of each individual, BC Law seemed like a natural place to

continue my education. As the initial weeks of law school passed and I got to know the other students in my section, I saw these institutional themes take on a human dimension. Between classes and during study sessions, I developed strong friendships with several of my section mates. They were bright, articulate, funny, and always willing to be lunch companion or offer their notes when I missed a class. As I found out later in the year, some of my best friends were also gay. Talking with them about their families, partners, interests, and accomplishments, I gained a deep appreciation for the courage with which they faced societal perception about their sexual orientation, and the encouraging example they set for others who were apprehensive about identifying themselves as gay or lesbian. With these strong relationships in place, I felt that BC Law was exactly the extension of my college experience which I had hoped it would be.

3. When I returned to begin my second year in Fall 2002, I encountered an institution which was disturbingly different from the one I had so eagerly joined a year before. Under pressure from the Air Force and its invocation of the Solomon Amendment, the faculty had voted to suspend the sexual orientation portion of the law school's nondiscrimination policy and treat the military as just another employer with complete access to the Career Services Center. With this full acquiescence to the military's demands, the inclusive environment which had shaped my first year vanished. Literally overnight, I lost the open and diverse atmosphere which had enriched me intellectually and emotionally, and the tolerant campus which had fostered my friendships with gay and lesbian students in my section. Sitting around the school cafeteria after learning of the

faculty decision, my friends and I struggled to comprehend how the Law School could be forced to abandon one of its defining features, and how we would carry on now that the values which had so attracted us to the school had been compromised by the threat of millions in lost federal funds.

4. Soon after the suspension, military recruiters arrived at the Law School, and I had to directly confront the presence of discrimination on campus. Watching JAG recruiters casually walk down the hallways and sip free coffee provided by the Career Services Center gave me a sickening feeling, as if it were perfectly normal for an employer who so openly practices bigotry to be welcomed like any other firm. It was as if our nondiscrimination policy and commitment to inclusiveness had never existed, and the notices posted by interview rooms elaborating on the circumstances of the military's unfettered recruiting provided little comfort. No amount of explanation or justification changed the fact that I had lost something vital to my law school experience, and that the decision to suspend the nondiscrimination policy would cloud the rest of my time in law school.

5. As difficult as it was for me to personally deal with the abrupt end to the school's inclusive atmosphere, it was even more difficult to watch the impact which the nondiscrimination policy's suspension had on my gay and lesbian friends. The vibrant involvement in class discussions and the energetic dialogue outside of class diminished, replaced by anxiety over the destruction of the institutional guarantee that they had lived and worked under during their first year. I watched my friends struggle to digest the fact that they were shut out of employment opportunities available to

heterosexual students, and that they now had to search for jobs in a Career Services Center that featured an employer that would never hire them no matter how bright, talented, or dedicated they were. More profoundly, I watched them confront the realization that they were now relegated to the role of second class citizens, and saw the pain caused by this assault on their personal dignity and sense of self worth.

6. For the remainder of my time as the President of the Coalition for Equality, and as a member of the bar after that, I will continue to oppose the Solomon Amendment and its poisonous effects on BC Law. This law has forced BC Law to abandon the open and inclusive environment which was such an important part of my own educational experience, intellectual growth, and emotional development. The Solomon Amendment has also seriously hurt gay and lesbian students, students who have made an array of positive contributions to the Law School and students whose insights and empathy have made me a better student and person. My straight friends, my gay friends, and I deserve the benefit of the tolerant campus which BC Law embraced when the faculty voted to add sexual orientation to the school's nondiscrimination policy in 1982. Anything less will be a triumph for government coercion and a betrayal of the promise that all of us relied on when we matriculated.

I declare under penalty of perjury that the foregoing is true and correct.

* * * * *

EXCERPT OF MINUSKIN DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ____

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF ALAN MINUSKIN

I, Alan D. Minuskin, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Associate Clinical Professor of Law at Boston College Law School ("BC Law" or "the Law School"). I have been on the BC Law faculty since 1990. My primary teaching responsibility is in the law school's Civil Litigation Clinic. I also teach Introduction to Lawyering and Professional Responsibility, a required first-year ethics course. I currently serve as Director of the Boston College Legal Assistance Bureau, a legal services office funded by the law school and staffed by faculty and students dedicated to promoting social justice by providing free legal advice and representation in civil matters to clients living below the poverty line. Since 1998 I have served as Chair of the Law School's Task Force on Military Recruiting Policy (further described below). If called as a witness,

I could and would testify to the following based on personal knowledge, or if indicated, on information and belief. In doing so I speak only for myself and not on behalf of any other person, institution or entity.

Principles of Equality and Non-discrimination at BC Law

2. BC Law is part of Boston College ("BC" or "the University), a university founded in the Jesuit tradition. Although BC's undergraduate departments, graduate school, and BC Law are all part of the same university, BC Law has its own policy against discrimination (the "Non-discrimination Policy" or the "Policy").

3. The BC Law faculty voted in 1982 to amend the school's Non-discrimination Policy to add "sexual orientation" as a basis on which discrimination would be barred. The Policy now provides as follows:

> Boston College Law School is committed to a policy against discrimination and harassment based on age; sex; race; color; religion; national origin or ancestry; sexual orientation; disability; or marital, family or military status. Boston College Law School extends use of its facilities to employers whose policies are consistent with this policy and expects that no discrimination or harassment will occur in hiring, promotion, compensation, and work assignments.

A true and correct copy of the Non-discrimination Policy is attached at Exhibit 1.

4. I view the Law School's Non-discrimination Policy as an important part of the law school's educational policy because an environment sufficiently conducive to teaching and learning is not possible if harm-

ful, irrational discrimination is supported or condoned by the school. Since I began chairing the Law School's Task Force on Military Recruiting in 1998, I have had hundreds of conversations with BC Law students about the law school's commitment to non-discrimination on the basis of sexual orientation. I have learned in conversations with gay, lesbian, and bisexual students that many chose to come to BC Law because of its long-standing commitment to diversity, including its intolerance of discrimination on the basis of sexual orientation. When BC Law made an exception for an openly discriminatory employer, students told me that they felt betrayed. They explained that the only message they could derive from abandonment of the Non-discrimination Policy was that the Law School was not really as serious about its commitments as promised. For many students this meant that they lost confidence in the sincerity of BC Law's commitment to diversity and its pledge of welcome and full citizenship in the community regardless of sexual orientation. They expressed profound disappointment and disillusionment at the notion that their school would cooperate with the suppression of their opportunity to express themselves fully and to avail themselves of all the rights and privileges afforded to their straight peers. They expressed concern that the instant elimination of one promised protection could mean that other promises and representations were not reliable.

5. I also learned from hundreds of conversations with straight BC Law students that they came to BC Law in part because of its commitment to diversity, including its pledge of welcome and full citizenship in the community regardless of sexual orientation. They too have expressed profound concern and confusion

about the sudden, blatant elimination of a protection that had been promised. They too worried that the institution's elimination of one promised protection made other commitments by the institution questionable.

6. Most concerned students with whom I spoke interpreted the Law School's policy shift to mean that one could not really trust basic assumptions about the acceptability of their own expressions within the community. They were, therefore, less likely to speak their minds. Instead of feeling the safety promised by the commitment to acceptance, diversity, and the prohibition of sexual orientation discrimination, they felt the danger of the instability of those guarantees.

7. For the same reasons I also view the act of weakening or impairing the Non-discrimination Policy to be a significant interference with the quality of the Law School's educational environment for many, if not most, students, staff, and faculty of the Law School.

8. Upon my information and belief, when BC Law was founded in 1929, its first dean, Dennis Dooley, envisioned a law school with a social conscience as well as an analytical mind. We have held fast to this vision. As BC Law's promotional materials explain, "While we have always placed a great deal of emphasis on the practical professional skills which every good lawyer must possess, those skills are imparted within a framework of ideals—ideals such as justice and public service —that have made the study and practice of law a calling for so many who come here." This framework makes for an environment in which students "are at once highly credentialed and highly collegial in their relationships with each other and with the faculty. That sense of community springs from a shared respect for

the law as the cornerstone of a democratic society, and for one another as legal scholars." A true and correct copy of the promotional materials is attached at Exhibit 2. At an institution where law and social justice are studied, an environment sensitive to the impropriety of irrational, harmful discrimination is essential. Any other sort of environment would be inconsistent with the fundamental principles of the education and professional orientation that the law school promises. The Non-discrimination Policy is thus an important part of BC Law's educational philosophy.

9. I chose to join the BC Law faculty in large part because of the school's historic and conspicuous commitment to social justice, including its prohibition of discrimination on the basis of sexual orientation.

BC Law's Non-discrimination Policy and Military Recruiting

10. Upon my information and belief, in implementing its Non-discrimination Policy, the Career Services Office of BC Law requires employers who wish to visit the law school campus to conduct interviews of BC Law students to sign the following statement:

> The undersigned employer hereby affirms that it is an equal opportunity employer and does not discriminate in any form based on age, sex, race, color, religion, national origin or ancestry, sexual orientation, disability or marital, family or military status. By using the services of Boston College Law School Office of Career Services, the undersigned employer agrees to abide by the above policy.

A true and correct copy of this statement is attached at Exhibit 3.

11. Upon my information and belief, because of the military's explicit policy of discrimination on the basis of sexual orientation, recruiters for branches of the United States military have never been able to certify that their offices do not discriminate on the basis of sexual orientation.

12. Upon my information and belief, because of the military's explicit policy of discrimination on the basis of sexual orientation, recruiters for branches of the United States military were prohibited from recruiting on the Law School campus from 1982 until 1998. Law students who wished to interview with military recruiters could do so, but interviews were scheduled to take place on the main campus of the University located 1.58 miles from the law school campus.

13. In 1990, the Association of American Law Schools required its members to insist that employers who seek to use a law school's career services facilities provide written assurance that they will not discriminate based upon sexual orientation or any other protected category. This requirement was not an issue for BC Law because it already adopted this policy eight years earlier.

14. After enactment of the first version of the Solomon Amendment in 1995, BC Law did not alter its policies or procedures. The law threatened suspension only of Department of Defense funding, but, upon my information and belief, the Law School did not, and does not, receive grants or appropriations from the Department of Defense.

15. Furthermore, language implementing the Solomon Amendment specified that Department of Defense funding could be withheld only from those parts ("sub-

elements") of an institution of higher education that denied access to military recruiters. The University's Department of Defense funding was not at risk. BC Law, therefore, continued not to permit military recruiters to conduct interviews using the facilities of the Law School's Career Services Office. Upon my information and belief, military recruitment of BC Law students continued to occur at the main campus of the University as described above.

16. In 1997, Congress expanded the Solomon Amendment to permit the suspension of a wider range of federal funding to schools that denied recruiters access. The wider range of federal funds included student financial assistance.

17. In March 1998, BC Law received a formal notice from the Department of Defense that the law school's eligibility for federal funds was in jeopardy as a result of BC Law's application of its Non-discrimination Policy to the military.

18. In September 1998, BC Law supplemented its Non-discrimination Policy with a "Discrimination Notice" that said:

> It is the policy of the Law School not to extend the use of its facilities to any organization that discriminates, even legally, on the basis of sexual orientation. We feel very strongly about this policy and make substantial efforts to assure that no student or student group is subjected to such discrimination. The Armed Forces, of which the Judge Advocate General's Corps (JAG) is a part, has had a long history of discriminatory practices against gays, lesbians, and bisexuals. However, under a recent federal law (the Solomon Amendment), the federal

> government may withhold federal funds from schools that do not allow military recruitment on-campus. Therefore, in response to a threat of the loss of federal funds, such as federal work-study and Perkins loans, which would be extremely harmful to students, Boston College Law School reluctantly permits the Judge Advocate General's Corps recruiters on-campus to conduct campus interviews. Boston College Law School opposes policies of discrimination on the basis of sexual orientation. The Law School will engage in appropriate activities to ameliorate any negative effects that granting access to the military may have on the quality of the learning environment for its students, particularly its gay, lesbian and bisexual students.

A true and correct copy of this notice is attached at Exhibit 4.

19. The BC Law faculty took the above action only because it understood that the Solomon Amendment would otherwise have allowed the government to cut off its law students' financial aid. BC Law did not wish to change its stance and would not have otherwise done so.

20. On October 7, 1998, then-Interim Dean James Rogers held an open forum on the Solomon issue, which he urged all students and other members of the Law School community to attend. The forum was held in the Law School's largest classroom. All classes regularly held at that time were cancelled to permit and encourage attendance.

21. In October 1998, Dean Rogers formed a Task Force on Military Recruiting Policy. Among other things, Dean Rogers instructed the Task Force to

consider and make recommendations on the various specific ways that we might attempt to structure JAG recruiting visits in a fashion that would comply with the Solomon Amendment but minimize the harm to the community. Dean Rogers appointed me to serve as chair of the Task Force.

22. In April 1999, upon a recommendation of the Task Force, the BC Law faculty adopted a policy of minimal compliance with the Solomon Amendment. The law school resolved to weaken its Non-discrimination Policy only to the extent necessary to prevent interruption of student financial assistance. In doing so the BC Law faculty declared, in part, that "the Faculty of Boston College Law School believe that the quality of the learning environment for our students is impaired by the use of Law School facilities for purposes of recruiting by any employer that does not adhere to our non-discrimination policy . . ."

23. While the Law School did not deny military recruiters access to campus or to students for purposes of military recruiting, such entry and access was to be provided only to the extent specifically required by the Solomon Amendment, and the Law School would not otherwise facilitate or assist the military in recruiting.

24. In April 1999, upon a recommendation of the Task Force, BC Law added the following language to its non-discrimination notice describing the newly adopted procedure for accommodating military recruiters.

> **Implementation Procedure for Military Recruitment**: Boston College Law School will not deny military recruiters entry to the campus or access to students for purposes of military recruiting. Such

> entry and access will be provided only to the extent specifically required by the Solomon Amendment, and the Law School will not otherwise facilitate or assist the military in recruiting. Information from military recruiters, including notices of the date and place of military recruiting visits and the address or other contact information for the military recruiter, will be available in a file kept at the Reserve Desk of the Law School Library. Students interested in meeting with military recruiters should review this information in order to contact military recruiters directly to schedule an interview time.

A true and correct copy of this language is attached at Exhibit 5.

25. What this meant in practice was that information from military recruiters would be kept for student use in the library but not in the Career Services Office. Students interested in interviewing with military recruiters contacted recruiters directly, and on-campus interview times and locations were facilitated by sign-up sheets through the Associate Dean's Office rather than the Career Services Office.

26. The above procedure remained in effect until September, 2002.

27. In the latter part of 1999 Congress exempted student financial assistance funds from the punitive reach of the Solomon Amendment. A school found to have prohibited or prevented military recruiters' access could no longer be sanctioned by the suspension or withdrawal of federal student financial assistance funds.

28. In January 2000 the Department of Defense announced a change in its regulations, one that ex-

panded the punitive reach of the Solomon Amendment to include deprivation of federal funding to an entire university if a subelement (e.g. a law school) were determined to have unlawfully inhibited on-campus military recruiting. This meant that an institutional subelement's (e.g. a law school) interference with recruiters' access could result in the loss of federal grants and contract funding to any and all other parts of the university.

29. In December 2001, Colonel Daniel B. Fincher of the US Air Force began a new volley of correspondence with BC consisting of written inquiries and replies about BC Law's procedures for facilitating military recruitment on the Law School campus.

30. Colonel Fincher's initial inquiry asserted, in my view mistakenly, that accommodating military recruiters in any way that was less than equal to the accommodations afforded non-discriminatory employers, amounted to a violation of federal law. The letter stated that Department of Defense officials would use BC's response to make a determination as to BC's eligibility to receive grants and contracts from specific federal agencies. The letter relied on 32 CFR part 216, 10 USC § 983, § 8120 of the DOD Appropriations Act of 2000, and referred to a loss of eligibility to receive appropriations from the Department of Defense, Labor, Transportation, Heath and Human Services, Education, and related agencies.

31. Through the General Counsel of Boston College, BC Law explained in a January 2002 written reply that the military was not "denied access" to students or to the BC Law campus. The letter expressed precisely how the procedure was tailored to meet the requirements of the Solomon Amendment.

32. Colonel Fincher did not respond until May 29, 2002, when he wrote that representatives of the US Air Force continued to view BC Law to be out of compliance with federal requirements because: (a) BC Law did not grant equal access to their students, and (b) BC did not grant access to the Career Services Office, but provided a more limited access to students through an associate dean. The letter threatened that if full access to students and the Career Services Office was not granted by July 1, 2002, the Air Force would "forward the matter to the Office of the Secretary of Defense with a recommendation of funding denial." Other than making a claim that equal access was required, Colonel Fincher did not respond to the substance of BC's claims or arguments.

33. Through its General Counsel, BC responded to Colonel Fincher on June 24, 2002, asking for an extension until the end of September, when, because of the academic calendar, the proper faculty vote could be taken. With no written response, BC General Counsel wrote again on July 17 asking for the same. An extension was granted orally, postponing the deadline until September 15.

34. Upon my information and belief, among the University funding put at risk by the DOD's interpretation of the Solomon Amendment and its own regulations was approximately five million dollars from the DOD and its components, most which ($4.3 million) came from the Air Force to the Institute for Scientific Research (a subelement of the University).

35. In late August and early September, the BC Law faculty learned about the above correspondence from the Air Force and the quickly approaching September 15 deadline. Because of the short time available,

no one on the faculty performed a thorough legal analysis of the regulations or the Department of Defense's application of them, and the faculty did not otherwise have the benefit of any such legal analysis. On September 9, a majority of the BC Law faculty, believing it had no choice but to grant full and equal access to the military or risk losing millions of dollars of university funding without any further process, voted to suspend the Non-discrimination Policy vis-à-vis military recruiters and to grant the military access to the facilities of the Career Services Office.

36. On September 15, 2002, the Lambda Law Students Association of BC Law wrote an open letter to the faculty and administrators of BC Law, protesting the decision to abandon the law school's policy with respect to the military. They stated:

> Law schools boast about the prestigious employment their graduates obtain in order to entice new law students. In this way, the Career Services Office is the heart of our campus. To allow into the Career Services Office, without protest, an employer that blatantly discriminates against *any* student is to functionally nullify our non-discrimination policy.

A true and correct copy of this letter is attached at Exhibit 6.

37. Also in the Fall 2002 semester open letters to the faculty and/or Law School community were written by BC Law's Black Law Students Association, International Law Society, Women's Law Center, and Domestic Violence Advocacy Project expressing support for the law school's Non-discrimination Policy without

exception. True and correct copies of those letters are attached as Exhibits 7-10.

38. On October 25, 2002 another group of BC Law students known as the Coalition for Equality at Boston College Law School wrote an open letter to the BC Law community. That letter was endorsed by the following BC Law student organizations: American Constitution Society Executive Board; Asian Pacific American Law Students Association; Holocaust/Human Rights Project; International Law Society; Jewish Law Students Association; Lambda Law Students Association; National Lawyers Guild; Public Interest Law Foundation Civil Rights Project; Reproductive Choice Coalition; and Women's Law Center. A true and correct copy of that letter is attached as Exhibit 11.

39. On October 3, 2002, BC Law's Career Services hosted the Air Force and the Army Judge Advocate General Corps. Soon thereafter, Navy and Marine JAGs visited BC Law to conduct on-campus recruiting. More military recruiters conducted on-campus interviews in the spring semester of 2003. All branches were treated exactly the same as other employers.

40. During the 2002-03 academic year, faculty and students protested multiple times against the presence of military recruiters on the BC Law School campus.

41. Upon my information and belief, recruiters for at least two branches of the US military are scheduled to conduct on-campus recruiting at BC Law with full access to the services provided by the Career Services Office in the early Fall of 2003.

42. Upon my information and belief, military recruiters on the BC Law campus this Fall will refuse to sign

the non-discrimination affirmation of the Career Services Office.

43. Upon my information and belief, military recruiters who interview openly gay, lesbian or bisexual candidates will, without regard to their qualifications to become excellent military attorneys, automatically refuse to pursue those candidates for employment.

44. Upon my information and belief, BC Law's abandonment in this instance of its decades-old stance against discrimination on the basis of sexual orientation, has destroyed, and will continue to destroy, students' confidence that an institutional pledge of non-discrimination will be honored.

45. I declare under penalty of perjury that the foregoing is true and correct.

* * * * *

NEUBORNE DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ___

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, DEFENDANTS

DECLARATION OF BURT NEUBORNE

I, Burt Neuborne, a lawyer admitted to practice before the Courts of the State of the New York, and the United States Supreme Court, hereby declares pursuant to 28 U.S.C. § 1746 and under penalty of perjury as follows:

1. I am the John Norton Pomeroy Professor of Law and Legal Director of the Brennan Center for Justice at New York University School of Law ("NYU Law" or the "Law School"), where, since 1974, I have taught Constitutional Law, Civil Procedure, Evidence, and Federal Courts. In 1990, I received New York University's Distinguished Teaching Medal. I make this declaration in support of plaintiffs' application for preliminary injunctive relief against a recently enunciated construction of the so-called Solomon Amendment that threatens American universities with massive across-

the-board cuts in federal funding unless law schools affiliated with such universities violate long-standing anti-discrimination policies forbidding institutional cooperation by law school placement officials with prospective employers who discriminate in hiring on the basis of race, religion, gender, national origin, or sexual orientation.

2. I believe that the current effort by the government to condition across-the-board federal funding of American universities on a coerced surrender of law school policies forbidding cooperation with prospective employers, including government employers, who discriminate in hiring, violates the First Amendment rights of law students, faculty and the law schools themselves. Where, as here, members of a law school academic community have joined together in refusing to provide institutional assistance to prospective employers who discriminate in hiring, government may not condition wholly unrelated financial assistance to the university at large on a law school's waiver of the application of the anti-discrimination policy in connection with the military's decision to discriminate in hiring on the basis of sexual orientation. Indeed, where, as here, a private academic community has exercised important First Amendment rights in order to speak and associate against discriminatory behavior, the Supreme Court has repeatedly ruled that government may not use the power of the purse to penalize the academic community for exercising its First Amendment rights, any more than it may use direct coercion. *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); FCC *v. League of*

Women Voters, 468 U.S. 364 (1984); *Speiser v. Randall*, 357 U.S. 513 (1958).

3. I make this declaration, however, not to discuss the legal authorities, but to describe to the Court why legal academic communities feel so deeply about a policy of denying institutional cooperation to employers who discriminate in hiring, and what the costs are to the academic community of government-coerced abandonment of any segment of the law school community to discrimination in hiring.

4. Historically, law schools have adopted anti-discrimination policies in connection with hiring as part of the painful process of eliminating irrational prejudice from the legal profession. In the beginning, the legal profession was white, male and Christian. Horrendous stories of the difficulties faced by Jews in gaining legal employment are legion, symbolized by the early struggles of Louis Brandeis and Felix Frankfurter. The century-long effort of women to find an equal place in the legal profession is symbolized by the early struggles of Sandra Day O'Connor and Ruth Bader Ginsburg. The continuing dramatic under-representation of people of color at all stages of the legal process remains one of the most troubling aspects of American law.

5. American law schools have reacted to the systemic exclusion of qualified persons from the profession by promising their students that the resources of the law schools would never be used to perpetuate such a deviation from the norms of equality and respect for the dignity of the individual that are taught inside their classrooms. Accordingly, for decades, legal employers have been told in no uncertain terms that law schools will not cooperate with them in finding new employees

unless the hiring process is an exercise in individual merit, not an excuse for racial, religious or gender discrimination. Three enormously important benefits have flowed from the adoption of such anti-discrimination policies.

First, the policies have placed modest pressures on employers to re-think the stereotypical notions that underlie prejudice and discrimination. Such modest pressures should not be overstated. Employers wishing to discriminate were—and are—fully able to contact interested students without the cooperation of the law schools; but the inconvenience and public scrutiny involved in such a process may well cause some would-be discriminators to have second thoughts.

Second, the policies were—and remain—crucial in providing law students belonging to groups that are the targets of irrational prejudice with a sense of reassurance and institutional support that is absolutely essential in any setting in which a student girds to fight prejudice in the outside world. The study of law is an anxiety-generating enterprise. Students from the most privileged backgrounds often find law school a significant challenge, even when the only thing they must worry about is their own ability and ambition. Law students drawn from groups facing on-going prejudice in the outside legal community must also deal with issues of personal ability; but, as well, they grapple with the knowledge that they must overcome headwinds of prejudice in order to forge a successful legal career. Such an additional layer of anxiety understandably complicates the law school experiences of many students. Law schools should respond with understanding. Many do. Among the most important aspects of support that a law school can extend to a young person

facing the prospect of prejudice is to distance itself institutionally in the strongest possible terms from any manifestation of prejudice. Only when a law student feels secure and valued as an equal in his or her own academic community can that student attain full academic potential. Anti-discrimination hiring policies have functioned as tangible evidence that American law schools welcome their diverse student bodies, and stand squarely behind every student in their hopes for a career based on merit. The academic value of such institutional reassurance to vulnerable students is incalculable.

Third, the policies provide crucial evidence to all students that the principles of equality before the law, protection of individual dignity, and respect for individual merit that are the bedrock of an American law school curriculum are worth living by; not merely worth preaching about. Law students can be a cynical lot. Adherence to principle is the gold standard by which they test the system, and the world around them. All too often, faced with a world in which reality falls far short of the ideal, law students retreat into a cynical shell, making it extremely difficult to conduct serious inquiry into issues of legal principle. It becomes difficult in those settings to ask students to distinguish between law and raw power. When, however, their law school stands up for principle, the act sends a message that it is possible to live by the ideals that we preach. Such a concrete manifestation of principled behavior encourages an intellectual environment in which all sides of a legal issue—including the wisdom and correctness of anti-discrimination hiring policies—can be raised and discussed vigorously in the classroom as if

they really mattered, because students can see that people act on principle, not merely talk about it.

6. During my teaching career at NYU Law School, I have observed the benefits of the anti-discrimination hiring policy in action. I have seen employers change their hiring patterns, in part because the policy encouraged re-thinking old ways. I have seen student members of groups facing prejudice draw solace from the support of their school and their fellow students. And, I have been privileged to participate in classroom discussion of fundamental principles with students who care deeply about principle, in part because their school was seen to take principle seriously, as well.

7. In 1978, when it became clear that discrimination on the basis of sexual orientation was impeding the ability of qualified law students to forge a legal career based on merit, I supported the expansion of NYU Law's anti-discrimination policy to preclude cooperation with employers who acted as though sexual orientation mattered in the practice of law. Over the years, since the expansion of the anti-discrimination hiring policy, I have observed employers re-think their sexual orientation hiring policies; gay and lesbian students draw support from the solidarity expressed by their school; and the greater law school community grapple both in and out of the classroom with difficult legal issues raised by sexual orientation in a climate in which adherence to principle was seen to matter.

8. I was, therefore, deeply saddened in 2000 when, under the unconstitutional threat of a university-wide loss of federal funding, NYU Law was forced to violate its deeply held principles by cooperating with an employer—the military—that had publicly announced an intention of discriminating in hiring on the basis of

sexual orientation. I was doubly saddened because, in my view, serving the nation as a military lawyer is a highly commendable form of public service. It was—and is—my belief that it is a tragic mistake to deny a law student an opportunity to serve this country as a military lawyer solely because of the student's sexual orientation. I understood, however, that the risk to the university as a whole of the loss of all federal funding, including federal funding to the medical school which serves poor communities in New York, and the loss of funding to other aspects of NYU that have historically offered the poor the first step on the road to the American dream, placed administrators in an impossible position. Indeed, it is precisely because I believe that the First Amendment precludes the government from confronting university administrators with such a Hobson's choice that I support this litigation.

9. My concern was not merely abstract. I was involved in teaching a year-long course in Constitutional Law when the pressures on the university forced the law school to abandon its principles and to give public aid and comfort to an employer that had sworn in advance not to hire members of the law school community for reasons having nothing to do with merit, and everything to do with irrational prejudice. I sought to discuss the issue in class, but was met with silence and a sense of abandonment by gay and lesbian students in my class. Students who had enrolled at NYU Law School because they felt supported and fully accepted believed that they were being sacrificed because the potential cost to the university of losing federal funds outweighed the value of principle. As one student said to me at the end of class: "What's the price tag on my

equal rights? Why should I believe you when you talk about principle?"

10. The impact on all students in the course was palpable. A world-weariness seemed to envelop the discussion, and the mere mention of the word "principle" lead to snickers. I do not believe that it is possible to discuss the profound issues of equality, individuality and institutional structure that form the basis of a Constitutional Law course effectively in an atmosphere where students believe that their law school has been forced by their government to abandon its commitment to equality in hiring because the government has made it too expensive to live up to principle. In the end, although the students displayed their usual mastery of the doctrinal material, I do not believe that the class was a success.

I have no quarrel with the administrators who were forced to abandon the principle of non-cooperation with employers who discriminate. They were placed in an impossible situation by an interpretation of the Solomon Amendment that threatened the very survival of the university as the cost of adherence to principle. Where, however, an academic community has agreed to act in accordance with principle, both because it is the right thing to do and because the health of the academic enterprise is aided by the decision, I do not believe that the First Amendment allows the government to place inexorable financial pressure on the academic community to abandon its principles as the price of continuing to receive wholly unrelated government financial support. This year, the government is using the threat of university-wide funding cut-offs to blackmail law

schools into compromising their anti-discrimination policies. If government is successful, how long will it be until similar threats are used to force the abandonment of affirmative action programs?

Executed on September 18, 2003
in New York City, New York

/s/ BURT NEUBORNE
BURT NEUBORNE

EXCERPT OF ROGERS DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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03 Civ. ___

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF JAMES S. ROGERS

I, James Steven Rogers, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am currently a Professor of Law at Boston College Law School ("BC Law" or "the Law School"). I have served BC Law in one capacity or another for over twenty years. In 1980, I joined the Law School faculty. In 1977, I became Associate Dean for Academic Affairs. Then, from 1998 to 1999, I served as the interim Dean of the Law School. I received my A.B. *summa cum laude* from the University of Pennsylvania in 1973, and a J.D. *magna cum laude* from Harvard Law School in 1976. I have taught commercial law, contracts, bankruptcy, corporations, restitution, and constitutional law, and am the author of various works on modern commercial law and bankruptcy, particularly in the field of negotiable instruments law and concepts, and several

articles and a book on the history of Anglo-American commercial law of bills and notes.

2. If called as a witness, I could and would testify to the following based on personal knowledge, or if indicated, on information and belief. My testimony reflects my personal views, formed while serving BC Law in the capacities described above. As I am no longer serving in any administrative role, I do not speak officially for Boston College Law School.

3. Nondiscrimination at BC Law is fundamentally a question of educational policy. The Law School, like many others, has long had a nondiscrimination policy (the "Nondiscrimination Policy" or "the Policy") pledging that we will not discriminate in our own activities, such as admissions, financial aid, operation of academic programs, awards and honors, or any other aspect of our academic and co-curricular programs, or in employment of faculty and staff, in hiring, promotion, compensation, or work assignments.

4. Since 1982, BC Law has included sexual orientation in our non-discrimination policy.

5. An important aspect of BC Law's non-discrimination policy is that we will not extend the services of our Career Services Office to employers whose policies are not consistent with our non-discrimination policy.

6. There is very good reason for this policy. As a professional school, our goal is not simply to educate, but to assist our students in becoming members of the profession. Our career services offices provide extensive information, physical facilities and logistical support to assist our students in obtaining employment, and, correlatively, to assist employers in reaching our

students to fill their staffing needs. Given our commitment to non-discrimination against gays and lesbians, we cannot in good conscience extend this extensive logistical support to employers who come to us saying "we seek your assistance in reaching your students, but we will not hire those of a particular race, gender, creed, or sexual orientation." To do so would be—and would be perceived by our community as—abetting the act of discrimination.

7, The reason for this policy also relates, perhaps even more importantly, to the effect that allowing recruitment on our campus by those who exclude gays and lesbians would have on our own educational program. I hardly need to explain to judges or lawyers who will read this declaration that a law school education is a stressful experience for law students. At one time there were, and there may still be, law schools that take positive delight in that fact, and profess to find educational value in inflicting psychic harm on their students.

8. But BC Law is not that sort of place. We seek to establish an environment in which our students are educationally challenged to the maximum, but do so in a supportive and caring community. The very heart of our mission and identity as a law school is that our students, and indeed, our entire community learns together. We often state that our goal is not only to train students who will be good lawyers, but students who will lead good lives.

9. Thus, as a matter of our own educational policy and philosophy, we firmly believe that we can educate students for careers of service to the profession only by providing an atmosphere at our law school that is hospitable to all of the members of our community. We

cannot tolerate any acts of harassment, abuse, or oppression against any member of our community, on grounds of sexual orientation or any other basis. We cannot succeed in our educational mission if some groups of our students feel that they too do not fully enjoy an atmosphere of mutual respect, in which their dignity is always upheld, and in which they feel free to express not only their intellectual views but also their personality and humanity, without fear or concern for discrimination, harassment, marginalization, or exclusion. Extending placement office services to any organization that excludes gay and lesbian students—or any other class—is fundamentally inconsistent with our educational policy.

10. As a law school, the strong orientation of our students and faculty is toward issues of legal and civil rights, so I think that it is appropriate for us to be especially guided by the consistency of our actions and policies with the principles of respect in civil society for the human dignity of all persons.

11. The Law School's position on the Solomon Amendment is not based on a notion that we should be able to tell the services how to run the military; rather it's based on the point that the military—and Congress —should not be telling us how to run a law school.

12. Nor is the Law School's policy on this issue or the exclusion of JAG recruiters an anti-military stance. As Pogo famously said "We have met the enemy and he is us." The source of the discrimination that gays face in the military—and the source of the harm inflicted on gay students by the Solomon Amendment is not the military; it's our elected leaders. The military services have shown that they can work to overcome ingrained prejudice—even in foxholes—against racial minorities

and (to some extent) women. If Congress acts to eliminate the discrimination against gays and lesbians in the military, I have no doubt that the services will act diligently to implement that policy. This is an important point because, as I noted above, our opposition to Solomon is based on our educational judgment that legal education requires an environment in which all of our students feel that they are fully respected members of our community. That's just as true for the many members of our student body who have or plan to pursue careers in the military. Our dispute is not with those who have served in the military, but with the US Congress and the executive that have persisted in denying that opportunity to others.

13. In the late spring of 1998, almost immediately upon the commencement of my term as interim dean, BC Law was one of a handful of schools to receive a formal notice from the Department of Defense (DOD) that our eligibility for federal funds was in jeopardy as a result of JAG's exclusion from on-campus recruiting.

14. As the legislation then stood, disqualification of the Law School from eligibility for federal funds would have had a serious impact on our students. The programs that would be at risk (work-study funding and Perkins loans) provided over $1.5 million annually to BC Law students. These are not programs that provide funding to the Law School itself for its own operation. Rather these are programs in which the Law School acts as intermediary for funding provided by the federal government to help students meet their heavy tuition bills.

15. In my view, this legislation was utterly pernicious. It sought to pit two groups of disadvantaged persons against each other: those with the greatest

need for access to federal educational loans, and those with the greatest need for protection against discrimination. By placing law school administrations in the position of having to choose between principle and fiscal need, it sought to commandeer the offices of private educational institutions and use us as the instruments for inflicting real harm on our students. A memo produced by the AALS Section on Gay and Lesbian Legal Issues (n/k/a the Section on Sexual Orientation and Gender Identity Issues, or SOGII) put it well: "This legislation is designed to force schools to select which among their students will be deemed expendable —those that need financial aid to secure a legal education or those that need antidiscrimination protection to secure their professional opportunities." A true and correct copy of this memo is attached at Exhibit 1.

16. The Law School and its faculty gave serious consideration to whether our institution and our students realistically could continue to function without access to federal educational funding and whether there was any realistic prospect of finding alternate sources of funding. Sadly, we concluded that the answer was no. Accordingly, the Law School Faculty voted, with great reluctance and concern, to create a limited amendment to our nondiscrimination policy pertaining to military recruitment that would permit JAG to conduct on-campus interviews.

17. The notice that we received from DOD, and the Faculty's reluctant decision to permit an exception to our Non-discrimination Policy happened in the late Spring, essentially after the close of the academic year. So it was not until the students returned in the Fall of the 1998-99 academic year that they became fully aware

of the issue when one of the military branches demanded an opportunity for on-campus recruiting.

18. When they did return, the students as a whole reacted with grave concern and indeed outrage. Our judgment at BC Law is that the environment in which we educate our students plays an essential role in our educational policy. The Solomon Amendment sought to force us to abandon the policies that we had judged were essential consequences of our own principles not only of social justice but also of educational philosophy. In my mind, there was no question that the Law School had to somehow respond in a way that would show our students we were willing to stand behind our values.

19. I appointed a Task Force, chaired by Professor Alan Minuskin, to study how we might work to minimize or undo the harm that the Solomon Amendment was inflicting on our school and our students. The students and faculty who participated in that Task Force worked to devise some creative ways of allowing the Law School to adhere as much as possible to the critical purpose of its nondiscrimination policy: the refusal to aid and abet the practices of discriminatory employers.

20. In addition, Professor Dan Barnett spearheaded an effort by students and faculty to organize support for passage of the Frank-Campbell Amendment, which sought to exempt the critical student-aid funds from the reach of Solomon. Members of the BC Law community were critical to the ultimate success of that effort.

21. Meanwhile, our Task Force devised a specific policy that would satisfy the letter of the Solomon Amendment but minimize the degree of entanglement by the Law School. At many Law Schools, the response

to Solomon was to allow military recruiters—albeit reluctantly and under protest—but to do so by re-admitting the military to the ordinary routine of the placement office program. At most schools that means providing substantial logistical support to recruiters, such as collecting resumes, scheduling individual student interviews, providing clerical support to the recruiters, and—literally—care and feeding. Working with people at other law schools through SOGII, the Task Force did what we as law professors are always telling our students to do, but sometimes forget to take our own advice. They actually read and carefully analyzed the statute and regulations.

22. The Task Force concluded that we were not required to provide logistical support under Solomon. And, if we really mean what we say in our Nondiscrimination Policy, we cannot provide one iota of greater support or facilitation than is required by the literal language of the statute.

23. Thus, the policy that we followed beginning in the 1998-99 academic year we believed, complied with Solomon. The career services office itself played no role whatsoever in arranging recruiting visits. If a service requested an on-campus interview, we would schedule a room. We kept a folder on reserve in our library in which we place notices of any on-campus interviews that have been scheduled. Students who were interested could get in touch with the recruiter and make whatever arrangements they wished about times or other aspects of the interview. But the school had no involvement in the process other than, as the statute says, not "preventing entry to the campus."

24. The tension between the Law School and the central University administration over this issue was

particularly acute at Boston College. I was never directly told by the central administration that I should not be taking the actions I was taking, or that I should try to stop the students and faculty from their efforts, but in a variety of subtle ways, it became clear to me that they would certainly prefer if things at the Law School were different.

25. So the constant message I received was "Couldn't we be a little quieter about this." The single moment that I best recall was late one Friday afternoon after a long and difficult week on this and other matters, when Alan Minuskin and Dan Barnett were in my office telling me about the next step in their repeal efforts, seeking funding to support it, and warning me that it would increase the BC Law profile. I heard the administrator voice inside me say "Couldn't we just be quiet about this."

26. But my conversations with our gay and lesbian students had made me realize that saying "Couldn't you just be quiet about this" is—precisely—what discrimination against gays and lesbians means. We who are straight do not have to keep our sexuality in a closet. We do not have to fear that on taking a new job it might not be safe to put a picture of our life's partner on our desk. We do not have to "just be quiet." The correlative of discrimination is privilege. We who are straight enjoy the privilege of being free to integrate our loving relationships into the rest of our personhood, both in the private and the public sphere. That is a right that our society still denies to gays and lesbians. What did our nondiscrimination policy mean if we weren't willing to fight to protect *all* of our students?

27. As Edmund Burke is thought to have said, "All that's necessary for the triumph of evil is for good men

to do nothing." No matter what our professional roles, all of us are, from time to time, called upon to take actions, large or small, that will have an impact on the ability of our gay and lesbian colleagues to live full, integrated lives. We all must pledge to work harder to realize when we are in those moments and to act appropriately. So, when the moment of truth finally came to me, there was just no way that I could look the gay and lesbians students in the eye and ask then to "just be quiet."

28. As Professor Minuskin describes in his declaration, see Minuskin Decl. at ¶¶ 29-35, BC Law eventually had to abandon entirely the application of its nondiscrimination policy to military recruiters when the military, after revising its regulations under Solomon, threatened Boston College with the loss of its federal funds. The fact that BC Law has been forced, under pressure of loss of essential funding to the rest of the University, has produced an atmosphere of great sadness and disappointment at the Law School.

* * * * *

EXCERPTS OF EXHIBIT 1 TO ROGERS DECLARATION

Supplemental Report on Amelioration

December 15, 1998

TO: Members and Friends, Section on Gay and Lesbian Legal Issues

All Law School Deans and Faculties of the United States

FR: Executive Committee, AALS Section on Gay and Lesbian Legal Issues

RE: On-Campus Military Recruiting - Balancing AALS Rules, Other Nondiscrimination Policies and the Solomon II Amendment

On September 15, 1998 the Section on Gay and Lesbian Legal Issues (Section) of the American Association of Law Schools (AALS) issued a report with recommendations (Report) on military recruiting at law schools, and on law school responses to recent federal legislation known as the "Solomon II" amendment. That amendment threatens to cut off three specified types of financial aid funds, mainly loans, to students at law schools that do not provide the military with reasonable access to campus, to students, and to certain information about students. The amendment therefore poses twin threats—first, to the ideal of a bias-free education environment and, second, to the availability of federal financial aid for needy and deserving students. This report ("Supplemental Report") supplements the original Report to help schools manage proactively these twin threats.

* * * * *

A final point bearing emphasis at the outset is that we focus below, as we did in the September 15 Report, on the law's requirements only because the objective is to avoid *uncompelled* complicity in *any* form or way in *any* employer's practice of de jure discrimination. But we underscore now that the most important question is what our institutions *should* do, in fairness to *all* our students, apart from what the law technically requires. We believe that our institutions should not help open up new placement opportunities and then help shut them down to a targeted class of its own students. We believe that no law school should discriminate invidiously against *any* student on the basis of *any* identity, whether or not a law allows it. By doing more than this law requires in this particular instance, our profession will be doing less than we should to be fair to *all* our students. By doing no more than this law requires, our profession can be fair both to deserving students who need financial aid as well as to sexual minority students who suffer the stigma and exclusion of the military's de jure discrimination.

Indeed, by voluntarily doing more than legally required, law schools allow themselves to be maneuvered into a false choice between need and principle. The law patently is designed to force institutional choices between two classifications of students: one based on class or need and the other based on gender or sexual orientation. This legislation is designed to force schools to select *which* among their students will be deemed expendable—those that need financial aid to secure a legal education or those that need anti-discrimination protection to secure their professional opportunities. Schools may not be able to avoid altogether the appearance of making such a destructive and divisive

choice, but they can avoid exacerbating the fact and effects of the invidious choice that this legislation invites.

If schools permit themselves to be put to false choices by mistakenly or inadvertently doing more than the law requires, they will be compounding the detrimental *on-campus* effects of military discrimination. These effects can include heightened tensions and on-campus acrimony fueled by the perception or reality that a school's actions represent or signal a "choice" between one or another of its own students, as well as a betrayal of the larger commitment to nondiscrimination. Schools should not permit themselves to be manipulated into this self-wounding position. Our profession should not permit this law unnecessarily to disturb the peace of law school campuses across the country by its forced reintroduction of flagrant, de jure prejudice into the educational environment. * * *

II. Introduction: De Jure Military Discrimination

Until recently, law schools did not permit the military to recruit on campus because the military discriminates de jure in several ways. First, the military refuses to interview, much less employ, any persons who it deems to be lesbian, gay or bisexual. Second, although the military will employ women for some positions, statutes and regulations prohibit the promotion of women to many career-advancing positions. Third, the military fires and denies various benefits to personnel whom it deems to be lesbian, gay, or bisexual. Fourth, the military engages in horrific practices targeting suspected lesbians, gays, and bisexuals, which include demands that individuals "name names" or be "outed" to their parents and relatives. These "search, out and destroy" campaigns

terrorize and victimize individuals with exemplary records of service and no record of misconduct simply on the basis of status or identity.

Law schools play a direct and special role in these "investigations" because military lawyers are the chief instruments of these witchhunts. Foreseeably, law students recruited on campus this year will in time become the legal personnel who seek out and use information extracted through such "investigations" to prosecute service members suspected of being lesbian, gay or bisexual, and regardless of whether those service members in fact have engaged in any conduct that violates military rules. In addition to bringing de jure discrimination directly to the law school, permitting the military to recruit on campus—much less providing administrative support for such recruitment—undermines social and legal commitments to nondiscrimination in far-reaching ways with profound human repercussions.

In response to Solomon II's twin threats, the AALS Executive Committee decided to "excuse" law schools' "noncompliance" with its nondiscrimination policy on two conditions: (1) the noncompliance resulted from Solomon's requirements and (2) law schools took action to ameliorate the detrimental effects of the discrimination coerced by Solomon. As AALS Memorandum 97-46, attached to this Supplemental Report, makes plain, "excused noncompliance" applies only to the military, and only for so long as Solomon II remains in effect in its current form. The Section Report of September 15 therefore encouraged law schools to tailor access to the military and avoid entanglement with its activities, emphasizing instead the duty to ameliorate, until such time as this law is modified,

repealed or invalidated. In this way, Solomon II's twin threats—to the ideal of a bias-free educational environment *and* to the need of deserving students for financial aid—can be blunted simultaneously until this law is removed or deactivated.

Based on a detailed analysis of the statute and other binding mandates established by preexisting nondiscrimination laws or policies, that Report also distilled ten principles ad guidelines for law schools' response to the new legal environment crated by Solomon II's enactment. That legal environment, the Report emphasized, required law schools to balance Solomon's new requirements against the practices already established under the substantive nondiscrimination principles embodied in the existing policies of the AALS, the law school, the university and/or local governments. The balanced and contextual approach encapsulated in the ten principles of the September 15 Report was designed to reduce to a minimum the detrimental effects of the on-campus discrimination forced by Solomon's threat of a financial aid cut-off without triggering the cut-off. To facilitate their easy review, a copy of the ten principles is appended at the end of this Supplemental Report.

In light of the new regulations—which we believe do not make any significant changes—this Supplemental Report identifies new ideas, suggestions and strategies for law schools. As with the original Report, this Supplemental Report is designed to minimize access and avoid entanglement as a way of reducing as much as possible the statute's twin threats: coupling minimum access with maximum amelioration is the best strategy for schools that wish to preserve as much as possible a bias-free educational environment while also preserving their students' eligibility for the affected federal

financial aid funds. This Supplemental Report's continuing focus on maximum amelioration ideally will help law schools to offset the remaining detrimental effects of Solomon II's actual coercion until the law is repealed, modified or invalidated.

III. The Objective: Avoiding Uncompelled Complicity

It bears note at the outset that "excused noncompliance" with AALS ByLaw 6.4 and Executive Committee Regulation 6.19 is an exception to the general principle of nondiscrimination. AALS ByLaw 6.4 expressly embodies this principle, prohibiting discrimination on the basis of "race, color, religion, national origin, sex, age, handicap, or sexual orientation" in every facet of legal education, from application and enrollment to promotion, graduation and employment. Executive Committee Regulation 6.19 specifically establishes "the obligation to provide an equal orientation opportunity to obtain employment without discrimination" on the basis enumerated above. The addition of sexual to the AALS nondiscrimination policy was adopted in 1990 by *unanimous* vote of the AALS House of Representatives. This principle additionally is endorsed and embodied in similar policies enacted by law schools and/or universities, which likewise mandate equal opportunity in legal education regardless of identities based on race, ethnicity, nationality, religion, gender, age, sexual orientation and physical ability.

* * * * *

* * * To ensure that amelioration is meaningful specifically for lesbian, gay, bisexual and women students—the ones who most bear the brunt of law schools' acquiescence to Solomon II's discriminatory

effects—the September 15 recommendations urge law schools to consult directly and continually with those student groups in designing, implementing and maintaining ongoing ameliorative programs and policies. If appropriate, concerned alumni and community leaders also should be included in amelioration initiatives. The bottom line is that all law schools should ensure that amelioration is effective both formally and *in practice*, which requires advance planning, timely consultation, careful action, dedication of resources and continued vigilance until such time as this law is repealed, modified or invalidated.

* * * * *

EXCERPTS OF EXHIBIT 1 TO ROSENKRANZ DECLARATION

BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC

Section 6-4. Diversity: Non-Discrimination and Affirmative Action.

a. A member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation. [See *Interpretive Principles*]

b. A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation. *A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity.*

c. A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color and sex. A member school may pursue additional affirmative action objectives.

* * * * *

6.19 The Obligation to Provide an Equal Opportunity to Obtain Employment Without Discrimination. A member school shall inform employers of its obligation under Bylaw 6-4(b), and shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b). A member school has a further obligation to investigate any complaints concerning discriminatory practices against its students to assure that placement assistance and facilities are made available only to employers whose practices are consistent with the principles of equal opportunity stated in Bylaw 6-4(b).

EXCERPT OF EXHIBIT 3 TO ROSENKRANZ DECLARATION

(The following statement was written by AALS Executive Director Carl Monk. It was sent to Deans of AALS Member and Fee-Paid Schools on August 13, 1997.)

Military Recruiting at Law School Career Services Offices:

Update on Actions Regarding Executive Committee Regulation 6.19, the Obligation to Provide Equal Opportunity to Obtain Employment Without Discrimination

* * * * *

The Executive Committee has considered at length the implications of the Solomon Amendment and the Department of Education's determination that the Amendment included Perkins Loan and Work-Study funds. The Committee recognizes that the Amendment, as construed, places most law schools in the difficult position of either foregoing financial aid funds that are critical to their students or receiving the financial aid funds but failing to provide an environment that adequately protects its students from the experience of discrimination. The Committee believes that each school must be permitted to decide for itself how to resolve this conflict without being held in impermissible violation of the bylaws. Thus, so long as the Solomon Amendment remains in effect in its current form, each member school will be free to choose whether to continue to comply with the bylaw requirements as it applies to the military. Schools that choose not to comply will have their noncompliance excused so long as they engage in appropriate activities to amelio-

rate the negative effects that granting access to the military has on the quality of the learning environment for its students, particularly its gay and lesbian students.

Before making a decision to permit the military to interview, we urge each school to examine the actual extent of financial aid and other funds that it is at risk of losing, to explore ways of avoiding the loss of fund through turning to alternative sources, and to consider the range of ways that it might adopt to ameliorate the negative effects of granting access, if access were to be granted.

For purposes of compliance with the bylaws, schools that choose to permit access to the military may demonstrate adequate "amelioration" by a number of different actions. As a starting point, each school should assure that all its students, as well as others in the law school community, are informed each year that the military discriminates on a basis not permitted by the school's nondiscrimination rules and the AALS bylaws and that the military is being permitted to interview only because of the loss of funds that would otherwise be imposed under the Solomon Amendment (or, in appropriate cases, because of higher university directives that compel the law school to permit access). Other ameliorative acts that schools might consider include forums or panels for the discussion of the military policy or for the discussion of discrimination based on sexual orientation. Although no specific type of amelioration is required, the Executive Committee will examine the actions schools take in the context of the totality of the school's efforts to support a hospitable environment for its students. In assessing that environment, the Association will consider, among

other things, the presence of an active lesbian and gay student organization and the presence of openly lesbian and gay faculty and staff. We would be grateful if schools would advise us of effective amelioration strategies in which they have engaged so that we can periodically share those strategies with other member schools.

* * * * *

EXCERPT OF EXHIBIT 5 TO ROSENKRANZ DECLARATION

PERSCOM [Seal]
Online

JAG FUNDED LEGAL EDUCATION PROGRAM (FLEP)

FLEP allows selected officers an opportunity to obtain a law degree at government expense. There are normally up to 15 slots a year Army-wide; if funding permits.

Eligibility criteria:

- Be active duty commissioned officers
- Have two to six years of active duty at the time law school commences
- DA photo at current grade not older than five years
- Further eligibility requirements are outlined in AR 351-2

Application procedures:

Submit an application packet, forwarded and endorsed by the chain of command (through the first 0-6) to arrive at MI branch. The suspense date to submit a FLEP packet to MI Branch is 1 October each year to allow processing prior to the board. The suspense to the FLEP proponent is 1 November 2002. Interested applicants must enclose their LSAT scores, DA Photos, and official college transcripts.

EXHIBIT 5 OF SEIDMAN DECLARATION

A STATEMENT FROM MEMBERS OF THE GEORGETOWN UNIVERSITY LAW CENTER FACULTY

We the undersigned, as members of the faculty of Georgetown University Law Center, unequivocally abhor the federal law which prohibits gay men, lesbians and bisexuals from serving in the armed services if such individuals ever disclose or act upon their sexual orientation. Such a policy is contrary to our fundamental principles of equality, honesty, and dignity. Hence, we reaffirm the faculty's resolution in 1991 that the armed services should be barred from recruiting GULC students on campus or with the assistance of our career services. We call upon the United States Congress to repeal the disgraceful "Solomon Amendment" which financially coerces schools to allow the armed services to recruit on campus.

All GULC students have the right to pursue careers in the military and we do not wish to interfere substantively with the ability of GULC students to obtain such employment. Indeed, we hope students educated at GULC under the principle carved on our library—"law is but the means; justice is the end"—will work within the military and other settings to achieve a true commitment to antidiscrimination.

We believe sexual orientation has no bearing on an individual's qualification to perform any job in any setting, be it the armed services, federal, state and local governments, or private entities. Moreover, we believe all individuals should be allowed to perform their jobs while being candid about their sexual orientation.

Finally, we believe an individual's sexual orientation should never be the basis for any discriminatory action taken against such individual. We look forward to the day when all segments of our country and its government can affirm these principles through word and action.

Signed,

[Signatures Omitted]

EXCERPT OF SWEENEY DECLARATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

03 Civ. ___

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., SOCIETY OF AMERICAN LAW TEACHERS, INC., ET AL., PLAINTIFFS

v.

DONALD H. RUMSFELD, IN HIS CAPACITY AS U.S. SECRETARY OF DEFENSE, ET AL., DEFENDANTS

DECLARATION OF ROBERT SWEENEY

I, Robert Sweeney, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a graduate of New York University School of Law ("NYU Law" or "the Law School"), which I attended from August 1999 until May 2002. I am also gay. From April 2000 to April 2001 I served as President of the Bisexual, Gay, and Lesbian Law Students Association (BGLLSA, n/k/a OUTLAW).

2. When I was deciding where to go to law school, I wanted to ensure that I spent those three critical years of study, exploration, challenge and growth at an institution that would measure my insights and contributions on the basis of their merits. I would be working too hard, assuming too many new responsibilities and taking too many financial and intellectual risks to willingly place myself in any other kind of environment.

I was not merely starting law school, I was starting a lifelong career as a lawyer; before stepping foot in the classroom I wanted an assurance that those responsible for the foundations of my legal education and training could and would insist on my equality, my dignity, and my humanity.

3. For these and other reasons, I was drawn to the strong sense of community at NYU Law, and to the promise of respect and equality that the Law School held out to me. I also believed that NYU Law stood out among other institutions for its very public, very sustained, and very pervasive commitment to nondiscrimination. All of the law schools I considered have policies that prohibit discrimination on the basis of sexual orientation, and all of them require that employers who use the law schools' services to recruit law students abide by that policy. However, like any statement of principle, it is the actions taken in defense of the principle that matter. NYU Law had a long historical record of insisting on maintaining its policy in the face of external pressures, particularly the various iterations of the Solomon Amendment. I was impressed with this record, and had every reason to believe that it would continue. Had I known ahead of time that these non-discrimination values would become so undermined at NYU Law, I would have chosen a different law school at which to pursue my degree.

4. As it was, by the time I graduated in 2002, NYU Law was no longer the place it was when I first enrolled. The community that I had carefully and thoughtfully selected was gone. The Law School, once a champion of equality, had become an appallingly compliant participant in discriminatory practices against its

own lesbian, bisexual, gay and transgendered ("LBGT") students.

5. This transformation began in the fall of my second year. In an October 1, 2000 letter, then-Dean of the Law School John Sexton informed the NYU Law community that personnel from the Law School's Office of Career Counseling and Placement (Placement Office) had been instructed to "grant parity of access to the military with regard to on-campus recruiting facilities." A true and correct copy of the Dean's letter is attached at Exhibit 1. Prior to this time, NYU Law had refused to provide the services or facilities of the Career Office to JAG recruiters from the various branches because the military would not sign a statement certifying compliance with the Law School's nondiscrimination policy. See Exhibit 1.

6. The basis for this decision, according to the Dean, was a change in the Department of Defense regulations interpreting the Solomon Amendment in such a way as to jeopardize millions of dollars in federal funds to the NYU Medical School. See Exhibit 1.

7. Dean Sexton promised to undertake ameliorative efforts. He said in his letter that the Placement Office would "post notices in a variety of forms noting that military practices are inconsistent with the school's non-discrimination policy," that the Law School "would actively organize fora to discuss these difficult issues," and that the Law School community would "explore, with the University and others in legal education, whether the new regulations might be challenged as illegal, and how the NYU Law School might contribute to such an effort." Exhibit 1.

8. In personal conversations with the Dean, I expressed my grave concerns about the Law School abandoning its non-discrimination policy. The Dean reassured me that he would sign on to any viable legal challenge to the Solomon Amendment, and that the Law School would engage in minimal compliance under the statute.

9. In the following months, however, I became profoundly disappointed with the way the Law School proceeded to handle the issue of military recruiting. As a threshold matter, it soon became clear that, in contrast to other law schools that had taken a far more aggressive stance by allowing the military only minimal access, NYU Law was going out of its way to overcomply with Solomon. By March 2001, the military had been given the chance to interview on NYU's campus four separate times, whereas, on information and belief, other law schools designated only one day per semester for the military to recruit on campus. The Law School not only provided opportunities for military recruiters to meet with NYU Law students, but provided services and facilities for the Army JAG Corps to meet with students from Fordham, and the Marine JAG Corps to meet with students from at least nineteen other law schools. I pleaded with the administration to engage in a thorough analysis of what was really required under the statute, and brought to their attention the decisions of other law schools to put many more limits on military recruiters.

10. The Law School's welcoming reception for the military, combined with its token and inadequate amelioration efforts, sent a painful message to me. As I explained in an October 11, 2001 letter to Dean Sexton, when the Law School assists a discriminatory employer

like the military, "[t]he Law School . . . help[s] to deny lesbian, bisexual, gay and transgendered, physically disabled and older students employment opportunities that our straight, younger and able-bodied classmates are eligible for. This creates a rift, engenders bitterness, and . . . lamentably welcome[s] bigotry back to our community." A true and correct copy of this letter is attached at Exhibit 2.

11. If the Law School wasn't going to fight for its students, we decided that we had to fight for ourselves. BGLLSA and Straights and Queers United Against Discrimination ("SQUAD"), an ad hoc student group formed in response to military recruiting at the Law School, took on the burden to raise awareness, educate students, faculty and staff, and try to maintain the spirit of the Law School's policy. I helped organize the protests on the days the military was scheduled to be on campus.

12. I was proud of our efforts—at least one JAG interviewer cancelled due to lack of interest, and BGLLSA and SQUAD members filled many of the scheduled interview slots with other recruiters. But I could not keep down my growing frustration that the Law School had done so little to support our efforts, and had done so much to accommodate the military.

13. I hoped that in the 2001-2002 academic year the Law School would rethink its approach to military recruiting and boost its efforts to defend gay and lesbian students at NYU. Particularly after the horrific events of September 11, we needed a clear statement from the Law School's leadership about the importance of equality and the protection of our fundamental freedoms. We did not get one.

14. Dean Sexton issued a statement similar to the one he wrote the year before, explaining that military recruiters would be back on NYU's campus that Fall under the same conditions. A true and correct copy of this statement is attached at Exhibit 3. I thought this communication failed to explain the Law School's status under Solomon or the rationale of its response, ignored the events of the prior year and the context of September 11, and was, overall, utterly insufficient.

15. The letter was, for me, the Law School's final repudiation of its non- discrimination policy. I no longer believed the Law School stood by its policy, and I told the Dean as much in a letter to him:

> The message I have received over the last two years is that although sexual orientation has been listed in our non-discrimination policy for over two decades, gays and lesbians are not regarded as full and equal members of our community. They represent a segment of the law school community which is not deserving of the same level of protection in recruitment as other groups. The trauma suffered by this group as a result of attending a law school which is now an active instrument of their mistreatment and exclusion, is not regarded as something the law school needs to be very concerned about, except in the case where it might jeopardize its accreditation. The pain and suffering of all (and I do mean all—for we have all to some degree been poisoned by distrust, bitterness and disappointment that necessarily accompanies discrimination) members of this community are not sufficient enough to compel the dean's presence at any forum dedicated to address this issue. I would be very curious to see how the same situation would have been handled if it had

been another 'protected' group's equality of opportunity at stake.

Exhibit 2.

16. I believe that the Law School abdicated its responsibility in a number of ways. Dean Sexton delegated Solomon-related issues to the Vice Dean, thereby effectively washing his hands of the issue and sending the message to the Law School community that this major shift in a decades-old policy was less significant and unjust than it really was. It appeared that the Vice Dean, in turn, did not have the necessary authority to make decisions with respect to handling Solomon issues. It also appeared that he did not have the time, energy or inclination to adequately address Solomon's effect on the Law School—neglecting to respond fully to students' concerns and failing to even read and understand the language of the statute. At a forum demanded by the students, the Vice Dean openly admitted that the Law School's reaction would have been different if instead of the LBGT community, it was a particular religious or racial group whose equality of employment opportunity was compromised. In addition, after encouraging vigorous student protest, the Vice Dean and the other faculty criticized student protesters for allegedly going too far by publicly using the names of students who interviewed with the military, and in a particularly inflammatory flyer, these faculty compared the student protesters to McCarthyites and anti-abortion activists who threaten and/or kill abortion doctors. The net effect of the faculty and administration's handling of Solomon-related issues was not only over-compliance with the regulation, it also created a divisive and bitter atmosphere which greatly detracted from the Law School's primary reason for

being: a place to teach and to learn. On one side were students who felt marginalized and angry at how easily they were stripped of their place at the table; on the other side were students who could not possibly understand what all the fuss was about and who were clearly legitimized in their dismissal of that "fuss" by the administration's actions. In the middle were a great number of students who were confused and distracted from their studies by all the protest and vitriol flying about, not to mention the faculty and members of the administration who were faced with a human rights and political divide becoming very personal in their classrooms or with employees who flatly refused to assist in any part of a discriminatory employer recruiting on campus. Do you fire someone for standing by a 22-year old policy of equal treatment?

17. The whole tenor of the Law School community and my experience as a student changed drastically from my 1st to my 2nd year. I carefully chose NYU Law because I believed in its record and its stated mission. I came to the Law School expecting that I would be guaranteed standing as a full member of the community and wound up dismissed, objectified and vilified by other members of that community. I came to the Law School hoping to learn the law, and wound up fighting a civil rights battle I thought had been laid to rest 22 years earlier.

18. My penultimate remarks to Dean Sexton describe how I felt by the end of my law school career:

> The giddy excitement which sustained me through my first year at this law school is gone. It has been replaced by anxiety, sadness, anger and disappoint-

ment. My heart has been broken, and every day here is a painful reminder of a trust betrayed.

Exhibit 2.

I declare under the penalty of perjury that the foregoing is true and correct.

* * * * *

EXHIBIT 1 TO ROSENKRANZ DECLARATION

From: Kennedy James P Maj 305
AMW/JA[James.Kennedy@mcguire.af.mil]

Sent: Monday, October 20, 2003 4:23 PM

To: Kennedy James P Maj 305 AMW/JA

Cc: Turner Lisa L Lt Col 305 AMW/JA; Kennedy James P Maj 305

Subject: USAF—summer intern program—deadline in NOVEMBER

Greetings, Career Services offices—

First, thank you again for all your assistance in the Fall interview program—it was great to meet so many talented and impressive law students.

Second, a couple of important points for your 2Ls to keep in mind about the Air Force Summer intern program. I am afraid that unless you actively convey these to your students some interested students might not get the word:

1. The deadline is 17 NOVEMBER—less than a month away. Last year it was in February, and they might assume that this year will be the same.

2. The application process is not the same as for 3 Ls who apply for JAG positions. The intern application can be found at the linked website (not in the AF JAG brochure). Also, there is no interview involved.

The internship program is a fantastic opportunity to get a first-hand JAG experience without incurring an active-duty service commitment. You may have 3Ls who did the Air Force internship last year—if so, I'd like to suggest that you encourage them to make

themselves available to tell interested 2Ls what they thought about it. Interested students may also contact me, or they can contact HQ USAF/JAX with their questions.

The job announcement can be found at: http://jobsearch.usajobs.opm.gov/jobsearch.asp?q=summer+intern+air_force&salmin=&salmax=&FedEmp=N&sort=rv&vw=d&brd=3876&ss=0&FedPub=Y&SUBMI

//s//
JAMES P. KENNEDY, Maj, USAF
Deputy Staff Judge Advocate
305 AMW/JA, 2901 Falcon Lane, McGuire AFB, NJ 08641
DSN 312-650-8020/2010, fax - 6866 or 5312. Commercial: 609-754-xxxx

Supreme Court, U.S.
FILED
JUL 19 2005
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(8)

No. 04-1152

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GREGORY G. KATSAS
Deputy Assistant Attorney General
IRVING L. GORNSTEIN
Assistant To The Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. 983(b)(1), as amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A., Tit. V, Subtit. F, § 552(a) to (d), 118 Stat. 1911, withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the court of appeals erred in holding that the Solomon Amendment likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

PARTIES TO THE PROCEEDING

Petitioners are Donald H. Rumsfeld, Margaret Spellings, Elaine Chao, Michael O. Leavitt, Norman Y. Mineta, and Michael Chertoff. Respondents are Forum for Academic and Institutional Rights, Society of American Law Teachers, Coalition for Equality, Rutgers Gay and Lesbian Caucus, Pam Nickisher, Leslie Fischer, Michael Blauschild, and Erwin Chemerinsky.

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In the Supreme Court of the United States

No. 04-1152

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 390 F.3d 219. The opinion of the district court (Pet. App. 82a-184a) is reported at 291 F. Supp. 2d 269.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2004. The petition for a writ of certiorari was filed on February 28, 2005, and was granted on May 2, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Solomon Amendment, 10 U.S.C. 983, as amended by the Ronald W. Reagan National Defense Authoriza-

tion Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A., Tit. V, Subtit. F, § 552(a) to (d), 118 Stat. 1911, is set forth in the appendix to the petition (Pet. App. 185a-188a). The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

1. Article I of the Constitution vests Congress with the power to "raise and support" military forces for the defense of the United States. U.S. Const. Art. I, § 8, Cls. 12-13. Enlisting qualified men and women in the military is essential in fulfilling that task. Except when military exigency has required resort to conscription, Congress has relied on voluntary enlistment as the most effective means of meeting its staffing needs. As a result, the defense of the United States depends on the ability of the armed forces to attract men and women who have the skills needed for the Nation's defense.

To meet that challenge, Congress has long required the armed forces to "conduct intensive recruiting campaigns" to encourage military enlistments. 10 U.S.C. 503(a)(1), As the demands of military service have grown more complex, the military has placed increasing emphasis on recruiting students from colleges and universities. At times, however, institutions of higher education have sought to restrict campus recruiting by the military.

Drawing not only on its authority to raise and support the armed forces, but also on its authority to "provide for the common Defence and general Welfare of the United States," U.S. Const. Art. I, §8, Cl. 1, and its authority to enact all laws necessary and proper to effectuate its Spending Power, *id.*, Art. I, § 8, Cl. 18,

Congress has enacted measures to encourage institutions of higher education to open up their campuses to military recruiters. In 1968, for example, Congress directed the National Aeronautics and Space Administration to withhold grants from nonprofit institutions of higher education that barred military recruiters from their campuses. National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 281. Similarly, in 1972, Congress enacted a law directing the Department of Defense to withhold funds from educational institutions that barred military recruiters from their campuses. Act of Sept. 26, 1972, Pub. L. No. 92-436, Tit. VI, § 606, 86 Stat. 740.

In 1994, some institutions of higher education were still barring military recruiters from campus. 140 Cong. Rec. 11,438 (1994). Congress therefore enacted a new law to encourage institutions of higher education to provide access to military recruiters. That law, known as the Solomon Amendment, specified that "[n]o funds available to the Department of Defense may be provided by grant or contract to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes * * * entry to campuses or access to students on campuses." National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A, Tit. V, Subtit. E, § 558, 108 Stat. 2776. The Solomon Amendment was similar to the 1972 Act, except that it removed from the Secretary of Defense any discretion to waive the funding condition. Compare § 558, 108 Stat. 2776, with § 606, 86 Stat. 740.

Representative Solomon explained the need for the new law. He stated that while "recruiting is the key to an all-volunteer army," in recent years, the military had

been "unable to find enough recruits to fill the current number of slots, especially with high-caliber students." 140 Cong. Rec. at 11,438. Representative Solomon stressed that encouraging institutions of higher education to open up their campuses to military recruiters was crucial to achieving recruitment goals because the military's previous recruitment success was "in large part due to recruiting on school campuses, both high school and college." *Ibid.*

Two years later, Congress expanded the funding condition to funds administered by the Departments of Labor, Health and Human Services, Education, and Transportation. Departments of Labor, Health & Human Services, and Education and Related Agencies Appropriations Act, 1997 (1997 Act), Pub. L. No. 104-208, Div. A, Tit. I, § 514(b), 110 Stat. 3009-271. In debate on that amendment, Representative Solomon reiterated the pressing need for the Solomon Amendment. He stated:

> [R]ecruiting is the key to our all-volunteer military forces, which have been such a spectacular success. Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and colleges and informing young people of the increased opportunities that a military tour or career can provide. That is why we need this amendment.

142 Cong. Rec. 16,860 (1996). Representative Goodlatte similarly stated: "Campus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people," and institutions that exclude military recruiters "interfere with the Federal Government's constitutionally mandated function of raising a military." *Id.* at 12,712.

Congress has since expanded the Solomon Amendment to cover more funding agencies. In its current form, the funding condition applies to funds administered by the Departments of Defense, Labor, Health and Human Services, Education, Transportation, and Homeland Security, the National Nuclear Security Administration, and the Central Intelligence Agency. 10 U.S.C. 983(d)(1) and (2), as amended by 2005 Act, Pub. L. No. 108-375, Div. A., Tit. V, § 552(a) to (d), 118 Stat. 1911-1912. Congress has excepted from the funding condition funds provided for student financial assistance. *Ibid.*

Congress has also amended the Solomon Amendment in other respects. In one amendment, Congress made clear that a denial of access by a "subelement" of an "institution" would lead to a withholding of funding from the entire "institution," including any "subelement." National Defense Authorization Act for Fiscal Year 2000 (2000 Act), Pub. L. No. 106-65, § 549(a), 113 Stat. 610. In another, Congress created an exception to its funding condition for institutions that have a long-standing policy of pacifism based on historical religious affiliation. 1997 Act § 514(c)(2), 110 Stat. 3009-271; 2000 Act § 549(a), 113 Stat. 610.

Most recently, Congress has added an amendment designed to ensure that military recruiters receive the same access to college campuses and students as other employers. In enforcing the Solomon Amendment, the Department of Defense, while seeking access for recruiting purposes, at first did not uniformly insist on obtaining the same degree of access to an institution's campus and students as that enjoyed by other employers. Pet. App. 7a. In the fall of 2001, however, the Department of Defense began to inform institutions that it

would withhold federal funds from institutions that did not afford equal access. *Id.* at 8a.

In 2004, Congress enacted an amendment expressly ratifying the equal access interpretation of the Solomon Amendment. In its current form, the Solomon Amendment now provides that specified federal funds may not be provided to an "institution of higher education," or a "subelement" of such an institution, if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from "gaining access" to campuses or students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." Pet. App. 185a-186a; 2005 Act, § 552, 118 Stat. at 1911.

The House Committee report accompanying the 2004 amendment explained the importance of equal access:

> [A]t no time since World War II has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs. Successful recruitment relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to [that of] other employers.

H.R. Rep. No. 443(I), 108th Cong. 2d Sess. 3-4 (2004).

2. Under 10 U.S.C. 654, a person generally may not serve in the armed forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex. The courts have repeatedly sustained the constitutionality of that policy.[1]

The American Association of Law Schools (AALS) is a non-profit association that has more than 160 law schools as members. Pet. App. 95a. Since 1990, the AALS has required its members to withhold "any form of placement assistance or use of the school's facilities" from employers who discriminate on the basis of sexual orientation or other specified criteria. J.A. 251-252 (AALS Bylaws §§ 6-4(b), 6.19). In response, most law schools adopted policies denying employers access to their career services facilities unless the employers certify that they do not discriminate on the basis of sexual orientation. Pet. App. 3a.

Following enactment of the Solomon Amendment, the AALS authorized member schools to permit military recruiters to use their career service facilities provided that the schools took steps to "ameliorate" the perceived impact of military recruiting on the student body. Pet. App. 96a-97a. The AALS advised that such amelioration should include informing students and the law school community that the military discriminates on a basis not permitted by the school's rules and that the military is being permitted to interview only because of the loss of funds that would otherwise be imposed under the Solomon Amendment or because of higher university directives. *Ibid.*

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[1] See *Able* v. *United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes* v. *California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997); *Richenberg* v. *Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); see also *Steffan* v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

Most law schools began to allow military recruiters to enter their campuses, while simultaneously expressing disapproval of the military's restrictions on service by homosexuals. Pet. App. 97a-99a. Law schools posted statements advising students that the military does not comply with the schools' policies. *Id.* at 98a. Faculty and student groups adopted resolutions condemning the military's policies. *Ibid.* And students and faculty held demonstrations protesting on-campus military recruitment. *Ibid.* Despite advice from the AALS that schools could make exceptions for the military, many schools still refused to provide military recruiters with access equal to that offered to other employers. *Id.* at 99a. The Department of Defense then clarified that the Solomon Amendment conditions federal funding on equal access, and notified law schools that the failure to provide equal access could lead to the withholding of federal funds. *Id.* at 101a. Almost all law schools that receive federal funding subsequently provided equal access to military recruiters. *Id.* at 102a.

3. The Forum for Academic and Institutional Rights, Inc. (FAIR) is an association of certain law schools and law school faculties. In September 2003, FAIR and others (respondents) brought suit against Secretary of Defense Donald R. Rumsfeld and others (petitioners) in the United States District Court for the District of New Jersey. Pet. App. 10a. Respondents alleged, *inter alia*, that the Solomon Amendment violates the First Amendment rights of law schools. *Id.* at 12a. Respondents immediately moved for a temporary restraining order and a preliminary injunction. *Id.* at 86a. The district court denied the request for a temporary restraining order, but required petitioners to respond to the preliminary injunction motion within seven days. *Ibid.* The district court subsequently denied respondents' request for a preliminary injunction. *Id.* at 82a-184a.

Applying the First Amendment standard for laws that affect expressive conduct, see *United States* v. *O'Brien*, 391 U.S. 367 (1968), the district court held that the Solomon Amendment does not violate respondents' First Amendment rights. Pet. App. 161a-166a. The court reasoned that the Solomon Amendment furthers the important government interest in raising a volunteer military, *id.* at 162a-163a, that the military's recruitment effort will be less effective if military recruiters are denied equal access to campuses and their students, *id.* at 164a, and that the Solomon Amendment does not seek to suppress ideas, *id.* at 165a-166a. The court emphasized that institutions are free to denounce the military's policies without risking the loss of federal funds. *Id.* at 166a.[2]

4. A divided panel of the Third Circuit reversed. Pet. App. 1a-81a. The panel majority held that respondents are likely to prevail on their claim that the Solomon Amendment violates the First Amendment, and it directed the district court to issue a preliminary injunction against its enforcement on that basis. *Id.* at 11a-48a.

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[2] The district court held that FAIR, individual students, faculty members, two law school student organizations, and a national association of law professors had standing to challenge the constitutionality of the Solomon Amendment. Pet. App. 84a-86a, 103a-128a. The court of appeals held that FAIR had standing, and did not determine the standing of any other party. *Id.* at 10a-11a n.7. In its second amended complaint, FAIR identified two of its members, Golden Gate University School of Law and the faculty of Whittier Law School. *Id.* at 87a. The United States agrees that FAIR has standing to represent identified law schools. See Pet. 7 n.2.

The court of appeals viewed the Solomon Amendment's funding condition as the equivalent of a direct regulatory requirement that institutions afford military recruiters equal access to their campuses and students. Pet. App. 11a-12a & n.9. The court then held that the Solomon Amendment is subject to strict scrutiny under the First Amendment on two grounds. *Id.* at 13a-15a.

First, the court concluded that the Solomon Amendment directly burdens the right of educational institutions to engage in expressive association. Pet. App. 15a-22a. The court reasoned that the presence of military recruiters on campus would force law schools to send a message that they accept discrimination against homosexuals as a legitimate form of behavior. *Id.* at 18a. Second, the court concluded that the Solomon Amendment implicates the compelled speech doctrine because it forces laws schools to propagate, accommodate, and subsidize a message regarding the service of homosexuals in the military with which they disagree. *Id.* at 25a-39a. Applying strict scrutiny, the court concluded that the government had failed to establish that there are no alternative means for effective recruitment of military personnel that would be less restrictive than the Solomon Amendment. Pet. App. 22a-24a.

The court of appeals also concluded that respondents would be entitled to a preliminary injunction even if the *O'Brien* standard rather than strict scrutiny were applicable. Pet. App. 43a-47a. The court held that a denial of equal access to military recruiters involves expressive conduct. *Id.* at 43a-44a. The court further concluded the government was required to supply specific evidence to the district court that the Solomon Amendment enhances the military's recruitment effort in order to sustain the Amendment under *O'Brien*. *Id.* at 45a.

Judge Aldisert dissented. Pet. App. 48a-81a. Applying the *O'Brien* framework, he concluded that the Solomon Amendment is constitutional. *Id.* at 78a-81a.

5. The government filed a motion in the court of appeals to stay the mandate pending the filing of a certiorari petition. By order dated January 20, 2005, the court of appeals granted a stay. By order dated February 2, 2005, the court denied respondents' motion to reconsider the stay.

SUMMARY OF ARGUMENT

A. In order to recruit the most talented men and women into the armed services, the military must be able to recruit students on college and university campuses, just as other employers do. Some colleges and universities, however, have denied military recruiters access to their students and campuses. To address that serious problem, the Solomon Amendment conditions the furnishing of federal funds to institutions of higher education on the institutions' agreement to grant military recruiters the same access to students that they provide to the recruiters of other employers.

That approach promotes the government's interest in recruiting the most talented men and women for the military, while at the same time respecting the legitimate interests of educational institutions. It is a condition on federal funding, not a direct mandate. It allows educational institutions to determine the level of access that recruiters, including military recruiters, receive. It asks only that, in exchange for supporting the education of an institution's students, the federal government should have an equal opportunity to recruit the very students whose education it has supported. And it leaves educational institutions entirely free to criticize the military on whatever ground they wish. For those

reasons, the Solomon Amendment falls well within Congress's authority to provide for the common defense and to raise and support the Nation's armed forces.

The court of appeals nonetheless held that the Solomon Amendment likely violates the First Amendment. In particular, the court concluded that the Solomon Amendment likely violates the right to associate, the compelled speech doctrine, the *O'Brien* standard, and the doctrine of unconstitutional conditions. Each of those holdings is incorrect.

B. Respondents' associational rights and *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), do not support the court of appeals' view that an educational institution may voluntarily associate with the government's money and then claim a First Amendment right not to associate with the government. The state law in *Dale* interfered with an expressive association's right to determine its own membership, and it forced an expressive association to convey a message that was contrary to its beliefs. The Solomon Amendment does neither.

The Solomon Amendment does not affect the criteria for determining an educational institution's internal composition. Recruiters for outside employers are not members of an educational institution; their presence on campus is temporary and episodic, and their functions is to recruit persons for employment *outside* the school. The presence of military recruiters on campus also does not force educational institutions to convey the message that they support the restrictions on service by homosexuals in the military. Students and the public readily understand that when recruiters visit campus they speak for their employers, not for the educational institution. Just as the policies of numerous other employers who send recruiters to campus are not

attributed to educational institutions, neither are the policies of the military.

Moreover, unlike the state law invalidated in *Dale*, the Solomon Amendment is a condition on funding, not a direct regulatory mandate. A party may not voluntarily accept federal money and then claim that a condition on the receipt of that money violates its right to associate. See *Grove City College* v. *Bell*, 465 U.S. 555 (1984).

C. The compelled speech doctrine applies only when a party "is obliged personally to express a message he disagrees with." *Johanns* v. *Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060 (2005). The Solomon Amendment does not violate the compelled speech doctrine because it does not force educational institutions to express any support for the restrictions on service in the military by homosexuals. Institutions need not utter any words of endorsement for that policy; nor must their representatives carry a sign expressing support for that policy. Educational institutions need only provide military recruiters the same access to students as they provide to the recruiters of other employers. The speech of the recruiters remains the speech of the government and the military—not the institution.

The compelled speech doctrine is also not implicated because the Solomon Amendment does not *compel* educational institutions to do anything. If they do not wish to furnish military recruiters with equal access to their students, they may decline federal assistance.

D. The Solomon Amendment is not subject to the standard for the regulation of expressive conduct set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). A denial of equal access does not resemble the kind of conduct that the Court has viewed as sufficiently expressive to constitute "speech" within the meaning of

the First Amendment. It does not involve the use of expressive symbols, such as an American flag or a black armband; nor does it involve traditional public protest activities such as peaceful picketing or sit-ins. Moreover, there is nothing inherently expressive about denying military recruiters equal access, and an institution's statement in advance about its reason for denying equal access does not transform that conduct into speech. Such prefatory and explanatory comments would give any conduct expressive content and would render the *O'Brien* test the general rule for conduct, rather than the exception.

In any event, the Solomon Amendment satisfies the *O'Brien* standard. Congress reasonably concluded that on-campus recruiting furthers the government's interest in recruiting the most talented men and women for the armed forces. Congress understood that the military's previous success in recruiting college and university students was due in large part to on-campus recruitment. That is consistent with the experience of other employers. If on-campus recruitment were not effective, institutions would not invite employers to recruit on campus and employers would not travel to campus to do so. And, in employing a rule of equal access, the Solomon Amendment relies on the educational institutions' own assessment of what is required for effective recruiting on their campuses. Further proof of the connection between the equal access condition and the goal of recruiting the most talented men and women for the military is not required. That is particularly true because if institutions do not believe there is a sufficient factual predicate for Congress's action, they are free to decline federal assistance.

E. The Solomon Amendment does not violate the doctrine of unconstitutional conditions. Any such argument fails at the premise: the Solomon Amendment's equal access condition is constitutional and would be constitutional even if it were imposed as a direct mandate. In any event, Congress's authority under the Spending Clause is exceeded only when Congress aims at the suppression of ideas. *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587 (1998). The Solomon Amendment is aimed at an institution's conduct in denying equal access; it is not aimed at the suppression of ideas.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE SOLOMON AMENDMENT LIKELY VIOLATES THE FIRST AMENDMENT

A. The Solomon Amendment Is A Carefully Tailored Exercise Of Congress's Authority To Provide For The Common Defense And To Raise And Support The Armed Forces

The success of the Nation's all-voluntary military depends on a military recruitment program that is able to attract the most talented men and women to the armed services. In order to have an effective recruitment program, the military must be able reach college and university students on campus, just as numerous other employers do. Before the enactment of the Solomon Amendment, however, some colleges and universities were denying military recruiters access to their campuses and students, and there was reason to conclude that they would continue to do so absent further congressional action.

The Solomon Amendment is a measured response to that pressing problem. In furtherance of Congress's authority to "provide for the common Defence and general Welfare," U.S. Const., Art. I, § 8, Cl. 1, and to

"raise and support Armies" and "provide and maintain a Navy" U.S. Const., Art. I, § 8, Cls. 12 and 13, the Solomon Amendment withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. 10 U.S.C. 983(b)(1), as amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (2005 Act), Pub. L. No. 108-375, Div. A., Tit. V, Subtit. F, § 552(a) to (d), 118 Stat. 1911.

Four features of the Solomon Amendment demonstrate that it promotes the government's interest in recruiting the most talented men and women to the military while at the same time respecting the legitimate interests of educational institutions. First, the Solomon Amendment does not take the form of a direct mandate. Rather, it conditions the availability of specified federal funds on institutions affording equal access. Thus, only institutions that voluntarily take federal funds have an obligation to furnish equal access to military recruiters. Those that decline federal assistance are free to deny equal access as well, but those that voluntarily associate with the federal government for purposes of receiving funding take that funding subject to the equal access provisions of the Solomon Amendment.

Second, the Solomon Amendment does not prescribe any fixed level of access that educational institutions must afford to military recruiters. It instead simply asks educational institutions to give the military the same level of access that the institutions deem appropriate for other employers. That equal access standard preserves maximum discretion to educational institutions to decide the level and type of access they will provide, while ensuring that the military is not placed at a competitive disadvantage relative to other potential employers in the search for the most talented men and women.

Third, the Solomon Amendment's equal access condition is directly related to the nature of the funding that is extended. The Solomon Amendment merely proposes that, in exchange for supporting the education of an institution's students, the federal government should have an equal opportunity to recruit the very students whose education it has supported.

Finally, the Solomon Amendment is addressed solely to an institution's *conduct* in denying equal access—conduct that undermines the military's recruitment effort, particularly in a time of War. It leaves institutions of higher education entirely free to criticize the military directly on whatever ground they choose without any risk of the loss of federal funds. Indeed, as the record reflects (Pet. App. 98a), educational institutions, their faculties, and their students have sharply criticized the statutory provision governing military service by homosexuals, and the Department of Defense has never threatened to withdraw federal funding based on that criticism.

For these reasons, the modest and tailored funding condition in the Solomon Amendment falls well within the authority of Congress to enact "necessary and proper" laws to carry into execution its powers under the Spending Clause and its other enumerated powers critical to the National defense. U.S. Const., Art. I, § 8, Cl. 18. The court of appeals nonetheless ordered the district court to enjoin the Solomon Amendment, holding that the Solomon Amendment likely violates the First Amendment right to associate for expressive purposes, the compelled speech doctrine, the *O'Brien* standard, and the doctrine of unconstitutional conditions.

Those holdings are incorrect and rest on a series of legal errors.

B. The Solomon Amendment Does Not Violate The First Amendment Right To Associate Recognized in *Boy Scouts of America* v. *Dale*

The court of appeals held that the Solomon Amendment interferes with a law school's First Amendment right to associate for expressive purposes and therefore triggers strict scrutiny. Pet. App. 15a-22a. No decision of this Court supports the court of appeals' view that an educational institution may voluntarily associate itself with the government's money, and then claim a First Amendment right not to associate with the government. The sole decision cited by the court of appeals to support its right-to-associate holding is *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). *Dale*, however, provides no support for that holding.

In *Dale*, the Court invalidated a state law that required the Boy Scouts to accept gay men as leaders of its organization. The Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648. Applying that standard, the Court found that "Dale's presence as an assistant scoutmaster would * * * surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," because it would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653-654.

As the Court's analysis demonstrates, the law invalidated in *Dale* had two crucial features that together caused it to run afoul of the First Amendment. First, it interfered with an expressive organization's interest in determining its own internal composition. Second, and relatedly, it forced an expressive organization to communicate a message that was contrary to its beliefs. The Solomon Amendment does neither of those two things.

1. *The Solomon Amendment does not affect an educational institution's internal composition*

The Solomon Amendment is not concerned with an institution's method of determining its own internal composition. It does not establish criteria for the selection of administrators, faculty, or students. Recruiters are almost by definition outsiders who are not a part of the institution itself, and they do not become members through their recruiting activities.

Far from intruding on an institution's interest in determining its own internal composition, the Solomon Amendment is concerned with the terms on which *outside* employers will temporarily and episodically visit the school, and more broadly with employment *outside* the school. Such employment is an integral part of the economic activity of the Nation and has long been subject to governmental regulation through anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. 2000e *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. 12101, *et seq.*, as well as numerous other laws. Educational institutions do not have any unique constitutional immunity to the application of laws that secure equal access to employment opportunities for their students or otherwise regulate employment activities,

such as recruiting. A school could not, for example, assert a "*Dale* right" to exclude minority-owned enterprises from the recruiting process. Indeed, most employment laws apply fully to a university's own employment decisions, even when those decisions determine the persons who will be involved in the institution's own internal affairs, yet the Court has never suggested that such laws run could run afoul of the First Amendment. See, *e.g.*, *University of Pa.* v. *EEOC*, 493 U.S. 182 (1990). Because the Solomon Amendment does not affect internal composition, but only an institution's temporary and episodic relationship with outside employers, there is even less basis for a claim that it impairs the right to associate.

2. *The Solomon Amendment does not force institutions to take a position that is contrary to their beliefs*

The Solomon Amendment also does not contain the other crucial feature of the law condemned in *Dale*. Unlike the state law in *Dale*, the Solomon Amendment does not force an institution to take a position on an issue that is inconsistent with its beliefs. Because a scout leader purports to speak for the Boy Scouts, the presence of a homosexual scout leader sent a message to its youth members and the public that the Boy Scouts approve of homosexual conduct. The Solomon Amendment has no comparable effect. Students and the public both can readily understand that military recruiters speak for the military, not for the educational institutions they visit.

Indeed, a part of the function of institutions of higher education is to expose students to a wide range of views, and students are accustomed to hearing visitors on campus whose views the university does not endorse. In that context, an institution's decision to allow military recruiters on campus cannot reasonably be understood to reflect an endorsement by the institution of the Act of Congress regarding service by homosexuals in the military. That is particularly true because military recruiters who come to campus pursuant to the Solomon Amendment receive the same access to students as the recruiters of numerous other employers, and those other recruiters are understood to speak for their employers, rather than the institution. No one would suppose, for example, that a law school endorses any "message" embedded in the work of corporate law firms, public interest groups across the ideological spectrum, or federal, state, and local governments, simply because their representatives come to the university to recruit. The same is true of military recruiters.

In another equal access context, the Court concluded that "secondary school students are mature enough" to comprehend the difference between speech the school sponsors and speech "it merely permits" pursuant to an equal access policy. *Westside Cmty Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion); accord *id.* at 268 (Marshall, J., concurring); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833-834, 841 (1995) (distinguishing university's own speech from speech it facilitates on a neutral basis). If high school students can perceive the difference between the school's own speech and the speech of student groups that meet regularly on school grounds, law school students can perceive a difference between the institution's message and the speech of outside recruiters visiting campus once or twice a year. When an institution gives military recruiters the same access as the recruiters of other employers, it no more endorses the policies of the military than it endorses the policies

of the numerous other employers that send recruiters to campus. Cf. *Mergens*, 496 U.S. at 252 (plurality opinion) (A school that permits a religious club to meet after school, just as it permits any other student group to do, "does not convey a message of state approval or endorsement of the particular religion."); *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981) (A forum that is available to a broad class of nonreligious as well as religious speakers "does not confer any imprimatur of state approval on religious sects or practices.").

Furthermore, an institution is fully equipped to explain why it allows military recruiters the same access to its students as the recruiters of other employers. For example, an institution is free to inform students and the public that it opposes Congress's policy regarding the service of homosexuals in the military, but that it has nonetheless allowed the military to recruit in order to receive federal funding that can have enormously beneficial effects for students, faculty, and the public at-large. J.A. 44-45. Students and the public should have no difficulty understanding that message. Cf. *Mergens*, 496 U.S. at 251 (plurality opinion) ("petitioner's fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students").[3]

[3] The court of appeals concluded that the Solomon Amendment does not permit recipients to criticize the federal statutory restrictions on the service of homosexuals in the military. Pet. App. 36a. That conclusion has no grounding in the Solomon Amendment's text. It conditions federal assistance on equal access to campus and students, not on equal statements of support for the employer's policies. Moreover, as the record in this case demonstrates, many law schools, faculty members, and students have vociferously criticized the restrictions on military service by homosexuals, *id.* at 97a-98a, and the Department of Defense has never attempted to cut off federal funding based on such criticism.

3. *The right to associate is not impaired simply because an organization asserts that it is*

Despite the two fundamental differences between the statute at issue in *Dale* and the Solomon Amendment, the court of appeals nonetheless concluded that the Solomon Amendment is likely unconstitutional under *Dale*. The court reached that conclusion by extrapolating from *Dale* the principle that an expressive association's right to associate is impaired whenever the association says so. Pet. App. 21a. That proposition has no grounding in the *Dale* decision and no logical stopping point. The Court in *Dale* did not condemn the state law at issue simply because the Boy Scouts claimed that it interfered with its right to expressive association. Rather, the Court invalidated that state law because it interfered with the Boy Scouts' interest in determining its own membership and leadership and because it required the organization to convey a message that was contrary to its beliefs. 530 U.S. at 648, 653-654. Because the Solomon Amendment does neither, it does not implicate the First Amendment right to associate.

4. Dale *is also inapplicable because institutions can avoid the equal access condition by declining federal funds*

There is an additional reason why the Solomon Amendment does not impermissibly intrude on the right to associate recognized in *Dale*. It involves a condition on federal assistance, not a regulatory requirement. If institutions of higher education do not wish to associate with military recruiters, they may simply de-

cline to associate themselves with the government's money.

The Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), demonstrates that when a party voluntarily accepts federal money, it may not claim that the conditions on the receipt of that money violate its First Amendment right to associate. In *Grove City*, the Court unanimously rejected a college's claim that Title IX's prohibition against discrimination on the basis of sex in programs that receive federal assistance violated the college's right to associate. The Court explained that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept," and that the college could avoid Title IX's equal opportunity condition by "terminat[ing] its participation in the [educational grant] program." *Id.* at 575; see also *Mergens*, 496 U.S. at 241 ("school district seeking to escape the statute's obligations could simply forgo federal funding").

The right-to-associate claim in this case has no firmer foundation than the claim rejected in *Grove City*. Indeed, while Title IX does govern the *internal* relationship among an institution and its students, the Solomon Amendment addresses the external and temporary relationship between an institution and an outside entity, the federal government itself. The United States is doing no more than any donor to an institution of higher education might reasonably do. It offers support for the institution's education program, and in return, seeks an equal opportunity to recruit the very students whose education it is supporting. Nothing in the Court's decision in *Dale* remotely suggests that an institution seeking the government's support may unilaterally dictate the terms of its association with the government.

The educational institution cannot find the United States to be an acceptable partner in financial arrangements promoting the education of its students and then insist upon a constitutional right to deem the United States unacceptable when it comes to having military representatives on campus recruiting those very students. And that is particularly true when the United States seeks nothing more than the same access to students that the institution affords to other prospective employers.

C. The Solomon Amendment Does Not Implicate The Compelled Speech Doctrine

The court of appeals also held that the Solomon Amendment is subject to strict scrutiny because it impermissibly compels speech. Pet. App. 25a-30a. The Solomon Amendment, however, does not violate the compelled speech doctrine.

1. *The compelled speech doctrine applies when an individual is obliged personally to express a message with which he disagrees*

In "true" compelled speech cases, "an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns* v. *Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060 (2005). For example, in *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), a state law required public school children to recite the Pledge of Allegiance while saluting the flag. Some children refused to comply because they regarded the message they were forced to convey as inconsistent with their religious beliefs. *Id.* at 629. The Court held that the First Amendment does not "le[ave] it open to public authorities to compel [a person] to utter" a message with which he does not agree. *Id.* at 634. Similarly, in *Wooley* v. *Maynard*, 430 U.S. 705

(1977), a state law required state licence plates to bear the state motto "Live Free or Die." *Id.* at 707. The plaintiffs considered the state motto "to be repugnant to their moral, religious, and political beliefs," and began to cover up the motto on the licence plates on their own vehicles. *Ibid.* The Court held that the First Amendment did not permit the State to "force[] an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* 715. The State could not, in effect, require motorists to serve "as a mobile billboard for the State's ideological message." *Ibid.*

2. *The Solomon Amendment does not force an institution to personally express support for Congress's policy regarding service by homosexuals*

The Solomon Amendment does not implicate the rule against compelled speech recognized in *Barnette* and *Wooley* because it does not induce an educational institution "personally to express a message [it] disagrees with." *Livestock Mktg.*, 125 S. Ct. at 2060. The court of appeals held that the Solomon Amendment implicates the compelled speech doctrine because respondents disagree with Congress's policy on the service of homosexuals in the military. Pet. App. 32a. But the Solomon Amendment does not seek to induce a law school "personally to express" its agreement with that policy: law school recipients do not have to "utter" any words of support for the policy, *Barnette*, 319 U.S. at 634; nor do they have to "constantly" carry around "in public view" a "mobile billboard" displaying support for that policy. *Wooley*, 430 U.S. at 715. Instead, they simply must provide military recruiters the same access to students

as they provide to other employers, if they wish to continue to receive federal funds.

The court of appeals found it sufficient for application of the compelled speech doctrine that law schools object to statements made *by military recruiters* that openly homosexual students are ineligible for military service. Pet. App. 32a. But such a statement, if it even came up in a particular interview, would simply report an objective fact in that one-to-one setting about the qualifications for military service. It would be no different from comparable statements made by other recruiters about the qualifications required by their employers. Military recruiters are on campus to explain military careers, encourage students to consider such careers and answer any questions they may have. The recruiters are thus engaged in the focused and serious work of meeting the needs of the Nation's armed forces—not to engage in political or ideological activity or to make speeches in support of Congress's policy concerning service by homosexuals.

More important, however, any such statement describing that policy would be made by the *recruiter*; it would not be personally expressed by the law school. As the Court recently reaffirmed in *Livestock Marketing*, the government's own speech does not provide the basis for a compelled speech claim by the fund recipients. It is only when a person is forced "personally to express a message he disagrees with" (125 S. Ct. at 2060) that the compelled speech doctrine is implicated.[4]

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[4] The court of appeals found that the Solomon Amendment forces law schools to convey the message that all employers are equal. Pet. App. 32a. The Solomon Amendment, however, does no such thing. It conditions federal assistance on institutions furnishing equal access, not on institutions representing that the military is equal to other employers. There is no more compelled

3. *The decisions relied on by the court of appeals do not support its compelled speech holding*

The court of appeals relied on several other cases as support for its compelled speech holding, including *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557,(1995), *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (196[illegible]). Pet. App. 35a. Those cases, however, provide no support for the court's holding.

In *Hurley*, a state law required a parade organizer to allow a group of individuals to display in its parade a gay pride message that the parade organizer did not like. The Court concluded that the parade organizer was using the parade to express its own point of view, 515 U.S. at 568, that the presence of persons marching under a gay pride banner would likely convey to the public that the parade organizer approved of the message, *id.* at 575, and that disclaiming a message is impractical in a moving parade, *id.* at 577. In those circumstances, the Court held, the state law violated the First Amendment because it "forced upon a speaker intimately connected with the communication advanced" the "dissemination of a view contrary to [its] own." *Id.* at 576.

This case has none of the characteristics that led to the invalidation of the state law in *Hurley*. A law school's recruitment program is not an expressive enterprise akin to a parade, and the purpose of the recruitment program is not to convey the law school's own messages, but to create an opportunity for an exchange of information between students and outside

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speech in the Solomon Amendment's equal access condition than in the equal access provision the Court addressed in *Mergens*.

employers. For reasons already discussed (pp. 20-22, *supra*), the temporary and episodic presence of military recruiters on campus, to the same extent as numerous other private- and public-sector recruiters, does not convey to students or the outside world that law schools endorse the existing rules concerning service by homosexuals in the military. And there is no practical obstacle preventing law schools from informing students and the public that they disapprove of that policy. *Hurley* is therefore inapposite here.

In *Tornillo*, a state law required a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. The Court held the law unconstitutional because it "exact[ed] a penalty on the basis of the content of the newspaper," 418 U.S. at 256, because faced with that penalty editors could well "blunt[] or reduce[]" their coverage of candidates, *id.* at 257, and because the First Amendment leaves the choice of what material to put in a newspaper to the newspaper's "editorial control and judgment," *id.* at 258. This case involves none of those features. The withdrawal of funding under the Solomon Amendment is not based on the content of what institutions of higher education say, but on their denial of equal access. The Solomon Amendment does not deter institutions from criticizing the military's policies; they are free to criticize the military without any risk of losing federal funding. And when engaged in the activities to which the Solomon Amendment is addressed, institutions are not involved in their own expressive enterprise, let alone in the editorial function of deciding what point of view to take in their own publications. They are involved in operating a program that assists outside employers in recruiting their students.

In *Pacific Gas*, a state regulation required a public utility that distributed a newsletter in its billing envelopes to include opposing messages of another speaker in the same envelopes. A plurality of the Court concluded that the regulation violated the First Amendment because its effect would be to deter the utility from engaging in controversial speech, 475 U.S. at 14, and because utilities are so closely identified with their billing envelopes that the inclusion of material in them would force the utility either to appear to agree with the enclosures or to respond, *id.* at 15-16. Those concerns do not exist here. The Solomon Amendment does not deter institutions of higher education from engaging in their own controversial speech; the obligation imposed by the Amendment is triggered not by an institution's own speech, but by the recruiting opportunities it extends to third-parties; and institutions are not so closely identified with the speech of recruiters that the views of the recruiters will be attributed to them unless they respond.[5]

[5] The court of appeals also relied on *United States* v. *United States Foods, Inc.*, 533 U.S. 405 (2001), and *Abood* v. *Detroit Board of Education.*, 431 U.S. 209 (1977), but those cases are compelled subsidy cases, not compelled speech cases. The compelled subsidy doctrine is implicated when a person is compelled to subsidize the speech of a private party he disagrees with. *Livestock Mktg.*, 125 S. Ct. at 2060. Here, however, the government is subsidizing institutions of higher education, rather than the other way around. And the speech at issue is government speech not private party speech. *Id.* at 2062. The compelled subsidy doctrine therefore has no application here.

4. A property owner does not have an unqualified First Amendment right to exclude from its property persons engaged in expressive activity

The court of appeals' compelled speech holding ultimately appears to rest on the notion that the First Amendment gives a property owner a right to exclude from its property anyone engaged in expressive activity. The Court rejected that view in *Pruneyard Shopping Center* v. *Robbins*, 447 U.S. 74 (1980). In that case, a shopping center challenged on compelled speech grounds a state law that permitted individuals to engage in expressive activities on its property. The Court held that the compelled speech doctrine was inapplicable because the property at issue was not reserved for the shopping center's private use, the views expressed by the individuals engaged in expressive activity would not likely be attributed to the shopping center, and the shopping center was free to post signs disavowing any connection between the shopping center and the messages of the individuals. *Id.* at 87.

The situation is the same here, except that the compelled speech concerns are further diluted by the Solomon Amendment's character as a spending condition, rather than a command as in *Pruneyard*. Institutions of higher education do not reserve the property devoted to recruitment to their private use; the views expressed by recruiters are not attributed to the institutions; and the institutions are free to disavow any connection to the messages expressed by recruiters. See also *Turner Broad. Sys., Inc.*. v. *FCC*, 512 U.S. 622, 653-657 (1994) (rejecting compelled speech challenge to a federal statute that required cable television systems to carry local broadcast stations on their systems). For that reason, and because the Solomon Amendment does not condition federal funding on institutions of higher

education personally expressing a view with which they disagree, the Solomon Amendment does not implicate the compelled speech doctrine.

5. The compelled speech doctrine also does not apply because institutions are not compelled to do anything

This case differs from all the other cases in which the Court has invalidated laws under the compelled speech doctrine in another critical respect. In all those cases, the government directly mandated a party to express a view the party disagreed with. *Barnette*, 319 U.S. at 627-630; *Wooley*, 430 U.S. at 707; *Hurley*, 515 U.S. at 561; *Tornillo*, 418 U.S. at 244; *Pacific Gas*, 475 U.S. at 6-7. Educational institutions covered by the Solomon Amendment have not been *compelled* to do anything. They have voluntarily chosen to accept federal funding on the condition that they provide military recruiters with equal access to their students and campuses. Institutions that do not wish to provide equal access to military recruiters may decline federal assistance. Likewise, institutions that do not wish to provide the military use of certain facilities or a particular degree of access can do so and continue to receive federal funding as long as they treat other recruiters the same. The Solomon Amendment does not implicate the compelled speech doctrine because it involves neither compulsion nor the institution's own speech within the meaning of the Court's precedents.

D. The Solomon Amendment Is Not Subject To, But In Any Event Satisfies, The *O'Brien* Standard

The court of appeals held that even if the right of expressive association and the compelled speech doctrine were not implicated, the Solomon Amendment would be subject to review under the standard for the regulation

of expressive conduct set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Pet. App. 43a-47a. The court of appeals further held that, on the existing record, the Solomon Amendment does not satisfy *O'Brien*'s standard of scrutiny. *Ibid.* Both holdings are incorrect. An institution's denial of equal access is not expressive conduct protected by the First Amendment. And even if it were, the Solomon Amendment satisfies the standards for the regulation of expressive conduct.

1. A denial of equal access is not "speech"

The First Amendment protects the freedom of "speech," not conduct. Nonetheless, the Court has held that some conduct is "sufficiently imbued with elements of communication" to constitute "speech" within the meaning of the First Amendment. *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989). Thus, the Court has held that when a person seeks to convey an idea through the use of an expressive symbol, such as the American flag or a black armband, the First Amendment is implicated. *Id.* at 404-406; *Tinker* v. *Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 509 (1969). Similarly, traditional public protest activities, such as peaceful picketing and sit-ins, also have a measure of First Amendment protection. *Brown* v. *Louisiana*, 383 U.S. 131, 141-142 (1966); *United States* v. *Grace*, 461 U.S. 171, 176-177 (1983).

At the same time, the Court has not "accept[ed] the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. And the Court has emphasized that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's

friends at a shopping mall—but such a kernel of expression is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989). Thus, the Court has held that ballroom dancing is not "speech" within the meaning of the First Amendment, no matter how determined dance partners are to express an idea. *Ibid.*

The conduct of denying military recruiters equal access does not resemble the conduct that the Court has found sufficiently imbued with an expressive component to constitute speech. It does not involve the use of expressive symbols, such as a flag, or a traditional public protest activity, such as picketing. Furthermore, there is nothing inherently expressive about denying equal access to military recruiters. Such conduct can occur for reasons that have nothing to do with the intent to express a message. For example, institutions may engage in such conduct in order to remove themselves from involvement in what they view as unfair discrimination, or they may simply seek to avoid the controversy that may surround the military's presence on campus. While institutions may also deny equal access to military recruiters in order to communicate an idea, such as opposition to Congress's policy on military service by homosexuals, the Court has rejected the view that such an intent can transform what is otherwise unprotected conduct into conduct that is protected by the First Amendment. *O'Brien*, 391 U.S. at 376.

Nor should the conduct of denying equal access be treated as speech simply because the institution may have announced in advance its *reason* for engaging in the conduct. If such a prior announcement of one's motive were sufficient to trigger First Amendment scrutiny of the government's regulation of the conduct itself, a broad range of governmental regulation could be

affected. The refusal to pay taxes, arson of a government building, or trespass on a neighbor's property would trigger an analysis under *O'Brien* as long as the actor announced in advance a point he was trying to make. And the fact that such prefatory speech is necessary to give the conduct expressive content demonstrates that it is not the kind of inherently expressive conduct to which the *O'Brien* test attaches. An individual should not be able to heighten the government's burden of justification through such means.

Thus, an institution's denial of equal access is conduct, not speech. And while an institution's statements about why it is engaging in the conduct are themselves speech, they do not transform the conduct of denying equal access into speech.

2. *The Solomon Amendment satisfies the* O'Brien *standard*

Even if the act of restricting campus access were sufficiently expressive to come within the scope of the First Amendment, Congress retains the power to deal with the harm to military recruiting that arises from that conduct. Under *O'Brien*, a regulation of conduct that imposes an incidental burden on expression is constitutional "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The last component of the analysis does not require the government to pursue the least restrictive means of furthering the government's interest. Instead, that component is satisfied when the government's interest "would be

achieved less effectively absent the regulation." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985).

The Solomon Amendment satisfies the *O'Brien* standard. The Amendment serves the compelling governmental interest in the recruitment of the most talented men and women to serve in the armed forces; that interest is entirely unrelated to the suppression of ideas; and that interest would be achieved less effectively if military recruiters did not have the same access to students at institutions of higher education as other employers.

3. Congress reasonably concluded that equal access to students enhances the military's recruitment effort, and no further proof of that relationship is required

The court of appeals did not question the importance of the government's interest in effective recruiting. Nor did it suggest that such an interest is related to the suppression of ideas. Instead, the court held that respondents are entitled to a preliminary injunction under *O'Brien* because the government did not present evidence in court to prove that the Solomon Amendment enhances military recruiting efforts. Pet. App. 45a. Congress had sound reasons for concluding that on-campus recruiting furthers the government's interest in recruiting talented men and women for the military, however, and a further factual showing is not required.

The Solomon Amendment reflects Congress's judgment that the military's recent success in recruiting talented high school and college candidates was "in large part due to recruiting on school campuses." 140 Cong. Rec. 11,438 (1994). Congress's judgment that personal access to students on campus enhances recruitment accords with the experience and practice of institutions and employers throughout the Nation. If personal access to students on campus did not enhance effective recruitment, institutions of higher education and their departments would not invite employers on campus, and employers would not take advantage of the offer. Congress could reasonably conclude that such a ubiquitous practice is not premised on a widely-shared misperception, but that rather, such on-campus recruiting is efficient and effective.

Furthermore, in employing a rule of *equal* access, the Solomon Amendment relies on the *educational institutions'* own assessments of what is required for effective recruiting on their campuses. When an educational institution allows recruiters to conduct on-campus interviews, provides recruiters with conveniently located interview facilities, makes the recruiters' literature available through the institution's placement office, and offers recruiters assistance in scheduling interviews, it is manifesting its own judgment about what is needed for recruiters adequately to reach potential recruits. And when an educational institution denies those opportunities to military recruiters, while making them available to other potential employers, it is necessarily depriving the military of access that the institution itself views as integral to effective recruiting, and placing the military at a unique competitive disadvantage as against all other prospective employers. An educational institution's own expert judgment therefore furnishes a firm factual basis for applying the Solomon Amendment to that institution.

This Court's cases confirm that Congress had an adequate basis for enacting the Solomon Amendment, and that *O'Brien* does not require a further factual presentation. In *O'Brien* itself, there were no studies or other

evidence documenting draft card burnings and their effects. Instead, Congress was permitted to rely on its own experience to make a judgment that draft card destruction would jeopardize the effectiveness of the Selective Service System. 391 U.S. at 378-380. Similarly, in *Albertini*, the government was not required to introduce evidence demonstrating that persons who receive a letter from a commanding officer barring entry to a military base pose a danger to the base. Instead, the Court simply accepted the validity of Congress's judgment to that effect. 472 U.S. at 689. And in *Clark* v. *Community for Creative Non-Violence (CCNV)*, 468 U.S. 288 (1984), the Court did not require the government to submit a factual presentation on the extent to which overnight camping increases the wear and tear on park properties. The Court instead accepted the Park Service's judgment that preventing overnight camping would avoid a measure of actual or threatened damage to the parks. *Id.* at 299.

Those cases demonstrate that Congress has substantial leeway to make reasonable judgments under *O'Brien*, and that the judicial role is far more limited under *O'Brien* than under strict scrutiny. That reduced judicial role is appropriate. *O'Brien* involves the regulation of conduct, not speech, and "so long as the regulation is unrelated to the suppression of expression, '[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken work.'" *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 299 (2000) (plurality opinion) (quoting *Johnson*, 491 U.S. at 406).

A deferential judicial role is particularly appropriate when, as here, the constitutional issue involves a challenge to a military judgment. The Constitution assigns the power "[t]o raise and support Armies" to Congress.

U.S. Const. Art I, § 8, Cl. 12. This Court has recognized that First Amendment claims provide no basis for judicial second-guessing of empirical judgments about military readiness made by the political Branches and the military. See *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986); cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). Particularly in a time of War, when military recruiters are straining to meet recruitment goals, Congress should not be hamstrung by time-consuming judicial inquiries into the best way to meet those goals.[6]

4. *A further evidentiary showing is particularly unwarranted because institutions can decline assistance*

There is one further reason that the court of appeals erred in insisting on a further factual presentation, rather than accepting Congress's reasonable judgment that on-campus recruiting enhances the military's recruitment effort. Under the Solomon Amendment, an educational institution elects to accept federal funding with full awareness of the condition that it grant equal access to military recruiters. In that context, nothing in *O'Brien* suggests that the First Amendment confers on the institution a right to insist at a later date upon any more of a justification for that condition than Con-

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[6] Some language in the court of appeals' decision suggests that it believed that the government was required to show that on-campus recruitment at *law schools* enhances the military's recruitment effort. Pet. App. 45a. That is not the correct inquiry. The Solomon Amendment applies to all institutions of higher education that receive specified funding. Accordingly, the correct inquiry under *O'Brien* is whether Congress could reasonably conclude that on-campus recruiting at the entire class of such institutions enhances military recruitment, not whether on-campus recruiting at some subset of that class, such as law schools, enhances military recruitment. See *CCNV*, 468 U.S. at 296-297.

gress's judgment that equal access is necessary. If an institution that is considering whether to accept federal funds does not believe that there is sufficient empirical justification for the government to insist upon that condition, it is free to decline to enter into the agreements. That is the same option anyone has to decline to accept a contract offer that he believes is not justified or sufficiently backed up by information furnished by the other party.

E. The Solomon Amendment Does Not Impose An Unconstitutional Condition

The court of appeals invoked the doctrine of unconstitutional conditions. In the court's view, under that doctrine, the government may not achieve through a funding condition what it could not achieve through a direct regulatory requirement. Pet. App. 11a-12a. That argument fails at its premise. For the reasons discussed at pp. 18-23, 25-31, 33-39, the Solomon Amendment is constitutional and would be constitutional even if imposed as a direct regulatory requirement. In either connection, the Solomon Amendment's equal access rule simply does not violate the right to associate, impermissibly compel speech, or violate the *O'Brien* standard.

In any event, the court of appeals was also wrong to conclude that, if Congress could not validly impose the Solomon Amendment directly on educational institutions, it is equally invalid as a condition on the receipt of federal funds. That view is inconsistent with the Court's holding in *National Endowment for the Arts (NEA)* v. *Finley*, 524 U.S. 569 (1998), that Congress has authority under the Spending Clause to establish criteria for the receipt of federal funding "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 588.

Congress's authority under the Spending Clause is not without First Amendment limits. But, in general, those limits are exceeded and the doctrine of unconstitutional conditions is implicated only when Congress aims "at the suppression of dangerous ideas." *NEA*, 524 U.S. at 587 (citations omitted). Otherwise, the recourse for a person who does not wish to be bound by a funding condition is to decline federal assistance.

In the two cases in which the Court has invalidated a federal funding condition under the First Amendment, it did so because Congress was aiming at the suppression of ideas. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 549 (2001) (viewpoint-based funding restriction on legal services violated the First Amendment because "Congress's antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest") (citations omitted); *FCC* v. *League of Women Voters*, 468 U.S. 364, 384 (1984) (law prohibiting "editorializing" by recipients of public broadcasting grants violated the First Amendment because it was motivated by a "desire to curtail expression of a particular point of view on controversial issues of general interest"). The other unconstitutional conditions cases cited by the court of appeals also involved efforts to suppress ideas. See *Rosenberger*, 515 U.S. at 830-831 (holding unconstitutional university's failure to fund religious publications on the ground that it was an attempt to suppress a particular point of view); *Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972) (holding that public college's refusal to renew employment contract would violate First Amendment if based on employee's public criticism of college administrators); *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958) (adverting to issue that would be raised by statute that withheld tax exemption for engaging in certain speech

where statute was "aimed at the suppression of dangerous ideas") (citation omitted). The Court has never suggested that Spending Clause legislation that addresses conduct, is not aimed at the suppression of ideas, and attempts only to secure for the government equal access to prospective employees could constitute an unconstitutional condition on the exercise of First Amendment rights.

The Solomon Amendment is aimed solely at an institution's *conduct* in denying equal access to military recruiters. It is entirely indifferent to an institution's reason for denying equal access. Nor is the Solomon Amendment aimed at the suppression of ideas in any other respect. Educational institutions that receive federal funds are free to criticize the military on whatever ground they wish without risking the loss of federal funds. As the record reflects, law schools, their faculties, and their students have not hesitated to engage in such criticism. Law schools have issued statements advising students that they disapprove of the restrictions on military service by homosexuals. Pet. App. 98a. Faculties and students have adopted resolutions condemning Congress's policy. *Ibid.* And students and faculty have held demonstrations protesting on-campus military recruitment. *Ibid.* No educational institution has been denied federal funds for that open and vocal criticism. Because the Solomon Amendment addresses conduct, and does not aim at the suppression of ideas, it does not implicate the doctrine of unconstitutional conditions.[7]

[7] The court of appeals concluded that Congress has authority to "endorse one viewpoint over another" only when it "create[s]" a "particular spending program." Pet. App. 13a n.9. Because the Solomon Amendment does not endorse one viewpoint over another, the scope of Congress's authority to do so is not at issue here. To the extent the court of appeals was suggesting a more general limitation on Congress's authority under the Spending Clause, that suggestion is incorrect. In addition to creating programs and defining their limits, Congress may also impose conditions relating to an institution's conduct of its own educational program when that program receives federal financial assistance. See, *e.g.*, 20 U.S.C. 1681(a) (prohibiting sex discrimination in any educational program receiving federal assistance); 42 U.S.C. 2000d (2000 & Supp. I 2001) (prohibiting racial discrimination in any federally assisted program); 20 U.S.C. 1687 (defining the relevant "program" for purposes of both statutes as the entire college or university when any part of it receives federal assistance).

For that reason, and for the reasons discussed at pp. 23-25, 32, 39-40, even if Congress lacked authority to impose the equal access condition as a direct regulatory requirement, the Solomon Amendment would still be valid Spending Clause legislation. The First Amendment does not preclude the government from conditioning federal funds for educating students on an equal opportunity to recruit those students.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GREGORY G. KATSAS
Deputy Assistant Attorney General
IRVING L. GORNSTEIN
Assistant To The Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

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In The
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DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,

Petitioner,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.,

Respondents.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF ADM. CHARLES S. ABBOT, LT. GEN DANIEL W. CHRISTMAN, GEN. WESLEY K. CLARK, ADM. ARCHIE CLEMINS, ET AL. IN SUPPORT OF PETITIONER

(The complete list of amici is on the inside cover)

JOE R. REEDER
PHILIP R. SELLINGER
JOHN P. EINWECHTER
OF COUNSEL
Greenberg Traurig
800 Connecticut Ave. N.W.
Washington, DC 20006
(202) 331-3125

MARTIN S. KAUFMAN*
* *COUNSEL OF RECORD*
Atlantic Legal Foundation
60 East 42nd Street
New York, NY 10165
(212) 867-3322

Counsel for Amicus Curiae

July 2005

COMPLETE LIST OF AMICI

Admiral Charles S. Abbot
Lieutenant General Daniel W. Christman
General Wesley K. Clark
Admiral Archie Clemins
Lieutenant General Lawrence P. Farrell
General Ronald R. Fogelman
General Ronald H. Griffith
General William H. Hartzog
General Joseph P. Hoar
Admiral Gregory Johnson
General Paul X. (P.X.) Kelley
General Paul J. Kern
General Carl E. Mundy, Jr.
Lieutenant General Tad J. Oelstrom
General Glenn K. Otis
General J. H. Binford Peay III
Honorable William J. Perry
Admiral Joseph W. Prueher
Honorable Joe R. Reeder
General Robert W. RisCassi
Honorable James R. Schlesinger
General John M.D. Shalikashvili
General Hugh Shelton
General Eric K. Shinseki
Lieutenant General Theodore G. Stroup, Jr.
General Gordon R. Sullivan
General John H. Tilelli
Lieutenant General Frederick E. Vollrath
General Anthony Zinni

QUESTION PRESENTED

The question presented is whether the Court of Appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Donald H. Rumsfeld, Margaret Spellings, Elaine Chao, Michael O. Leavitt, Norman Y. Mineta, and Michael Chertoff.

Respondents are Forum for Academic and Institutional Rights, Society of American Law Teachers, Coalition for Equality, Rutgers Gay and Lesbian Caucus, Pam Nickisher, Leslie Fischer, Michael Blauschild, and Erwin Chemerinsky.

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The top-ranking former senior U.S. military officers and civilian Department of Defense officials listed below respectfully submit this brief as *amici curiae* in support of the petitioners.[1] *Amici*

[1] Pursuant to Rule 37, the parties have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. In accordance with Rule 37.6, amici state that no (continued...)

believe that access to college and university campuses is essential to effectuate Congress' constitutionally mandated duty to "raise and support" a military, and that on-campus recruiting does not interfere with the First Amendment rights of faculty or students to freedom of speech or association. *Amici* therefore urge reversal of the decision of the United State Court of Appeals for the Third Circuit.

INTEREST OF *AMICI*

Amici are former top-ranking officers and civilian leaders of the United States Army, Navy, Air Force, and Marine Corps, and the Department of Defense who are deeply interested in this case and its impact on the quality of our nation's officer corps and the military's ability to fulfill its vital missions. *Amici*'s concerns are informed by decades of experience and accomplishment at the very highest positions in our nation's military leadership. They submit this brief to emphasize the critical role played by on-campus recruiting in meeting the personnel requirements of an all-volunteer military. A brief summary of their most recent positions follows:

Admiral Charles S. Abbot, retired 4-star, Deputy Commander, European Command (1998-2000), and Commander, U.S. 6th Fleet (1996-98).

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[1](...continued)
counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Lieutenant General Daniel W. Christman, retired 3-star, Superintendent of the U.S. Military Academy at West Point (1996-2001).

General Wesley K. Clark, retired 4-star, Supreme Allied Commander, Europe (1997-2000), and Commander in Chief, U.S. Southern Command (1996-97).

Admiral Archie Clemins, retired 4-star, Commander in Chief, U.S. Pacific Fleet (1996-99).

Lieutenant General Lawrence P. Farrell, retired 3-star, Deputy Chief of Staff, Plans and Programs U.S. Air Force (1997-98), and Vice Commander Air Force Material Command (1995-97).

General Ronald R. Fogelman, retired 4-star, Air Force Chief of Staff (1994-97) with overall responsibility for organizing, training and leading the 750,000 active duty, Guard, Reserve and civilian members, and Commander in Chief of U.S. Transcom (1992-94).

General Ronald H. Griffith, retired 4-star, Army Vice Chief of Staff (1995-97), Army Inspector General (1991-95), and Commanding General, 1st Armored Division (1989-91).

General William W. Hartzog, retired 4-star, Commanding General Army Training and Doctrine Command (1994-98), Deputy Commanding General, Atlantic Command (1993-94), and Commanding General, 1st Infantry Division (1991-93).

General Joseph P. Hoar, retired Marine 4-star, Commander in Chief, U.S. Central Command (1991-94).

Admiral Gregory Johnson, retired 4-star, Commander, Naval Forces Europe and Commander, Allied Forces Southern Europe (2001-2004), Commander U.S. Sixth Flee, and Commander Allied Striking and Support Forces Southern Europe (2000-2001).

General P. X. Kelley, retired 4-star, 28th Commandant of the U.S. Marine Corps (1983-87), with overall responsibility for organizing, training and leading the Corps.

General Paul J. Kern, retired 4-star, Commanding General, Army Material Command (2001-04), Senior Advisor for Army Research, Development, and Acquisition (1997-2001), and Commander, 4th Infantry Division (1996-97).

General Carl E. Mundy, Jr., retired 4-star, 30th Commandant of the U.S. Marine Corps (1991-95),with overall responsibility for organizing, training and leading the Corps, and Marine Corps Director of Personnel Procurement.

Lieutenant General Tad J. Oelstrom, retired 3-star, Superintendent, U.S. Air Force Academy (1997-2000), and currently Director, National Security Program, Kennedy School of Government, Harvard University.

General Glenn K. Otis, retired 4-star, Commander in Chief, U.S. Army Europe, and concurrently Commander of NATO's Central Army Group (1983-88), and commander U. S. Army Training and Doctrine Command (1981-83).

General J. H. Binford Peay III, retired 4-star, Commander in Chief, U.S. Central Command (1994-97), Army Vice Chief of Staff (1993-94), and Commanding General, 101st Airborne Division (1989-91).

Honorable William J. Perry, 19th Secretary of Defense (1994-97), Deputy Secretary of Defense (1993-94) and Under Secretary of Defense for Research and Engineering (1977-81), and currently a Professor of Engineering at Stanford University.

Admiral Joseph W. Prueher, retired 4-star, Commander in Chief, U.S. Pacific Command (1996-99), Commandant of Midshipmen, U.S. Naval Academy, and U.S. Ambassador to China (1999-2001).

Honorable Joe R. Reeder, 14th Under Secretary of the Army (1993-97), had oversight responsibility for admission criteria for the U. S. Military Academy and the ROTC programs at our nation's universities.

General Robert W. RisCassi, retired 4-star, Commander in Chief, United Nations Command and Combined Forces Command Republic of Korea (1990-93), Army Vice Chief of Staff (1988-90), and Commanding General, 9th Infantry Division (1983-85).

Honorable James R. Schlesinger, 12th Secretary of Defense (1973-74), Secretary of Energy (1977-79), Director, Central Intelligence Agency (1973). Dr. Schlesinger is a former member, Board of Overseers, Harvard College.

General John M.D. Shalikashvili, retired 4-star, 13th Chairman of the Joint Chiefs of Staff (1993-97), and Supreme Allied Commander, Europe (1992-92).

General Hugh Shelton, retired 4-star, 14th Chairman of Joint Chiefs of Staff (1997-2001), and Commander in Chief, U.S. Special Operations Command (1996-97).

General Eric K. Shinseki, retired 4-star, Army Chief of Staff (1999-2003), responsible for organizing, training, and leading over one million active duty, Guard, Reserve, and civilian members worldwide.

Lieutenant General Theodore G. Stroup, Jr., retired 3-star, Deputy Chief of Staff for Personnel, U.S. Army (1994-96).

General Gordon R. Sullivan, retired 4-star, Army Chief of Staff (1991-95), responsible for organizing, training and leading over one million active duty, Guard, Reserve, and civilian members worldwide.

General John H. Tilelli, retired 4-star, Commander in Chief, United Nations Command and Combined Forces Command Republic of Korea (1996-99), Commanding General, U.S. Army Forces Command (1995-96), Army Vice Chief of Staff (1994-95), and Commanding General, 1st Cavalry Division during the Gulf War.

Lieutenant General Frederick E. Vollrath, retired 3-star, Deputy Chief of Staff for Personnel, U.S. Army (1996-98), currently vice president for human resources of a Fortune 150 corporation.

General Anthony Zinni, retired Marine 4-star, Commander in Chief, U.S. Central Command (1997-2001), and U.S. Special Peace Envoy to the Middle East (2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech."

The Solomon Amendment, 10 U.S.C. 983, is set forth in the appendix to the petition for certiorari (Pet. App. 185a-188a).

STATEMENT OF THE CASE

Article I of the Constitution vests in Congress the power to "raise and support" military forces for the defense of the United States. U.S. Const. Art. I, § 8, Cl. 12.

Enlisting qualified men and women in the military is essential to raising a military force capable of defending the United States. *Amici* are certain that the Nation's defense depends upon the ability of the armed forces to attract men and women of the highest caliber, especially as weapons systems, combat and strategic intelligence, communications, weapons and materiel development, logistics, and even personnel management have become increasingly sophisticated and therefore dependent not only on the latest technological developments but also on the intelligence, education and specialized knowledge of military personnel.

For several decades, and currently, the United States military has been an all volunteer force. To fulfill the military's personnel requirements, federal law requires the armed forces to "conduct intensive recruiting campaigns" to encourage military enlistments. 10 U.S.C. 503(a)(1) (codifying Armed Forces Voluntary Recruitment Act of 1945, ch. 393, § 2, 59 Stat. 538). As the requirements of military service have become increasingly

complex, the military has placed corresponding emphasis on recruiting students from colleges and universities.

Because some colleges and universities have restricted campus recruiting by the military, in 1994 Congress enacted legislation that directed the Department of Defense to withhold funds from any institution of higher education that denied military recruiters access to campuses and students. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A, Tit. V, § 558, 108 Stat. 2776. In 1997 Congress amended the law by adding several additional federal agencies similarly constrained. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-271, called the "Solomon Amendment" after the Member of Congress who originally introduced it, codified, as amended, at 10 U.S.C. § 983.

The Solomon Amendment, 10 U.S.C. 983(b)(1), requires that certain specified funds[2] are not to be provided to any "institution of higher education," or a "subelement" of such an institution, that has "a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students "in a manner that is at least equal in quality

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[2] The Act applies to funds provided by the Departments of Defense, Homeland Security, Health and Human Services, the Central Intelligence Agency, and other enumerated agencies. 10 U.S.C. § 983(d)(1). The Act does **not** apply to funds provided to educational institutions or individuals "solely for student financial assistance, related administrative costs, or costs associated with attendance." 10 U.S.C. § 983(d)(2) (emphasis added); funding of students through scholarships, loans and loan guarantees is not affected.

and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. 983(b)(1).[3,4]

The Solomon Amendment neither requires a minimum degree of access to military recruiters, nor does it mandate that colleges and universities provide equal access to military recruiters. Rather, it merely conditions eligibility for certain federal funds upon the granting of equal access to military. In other words, an institution cannot both deny equal access to military recruiters and receive the specified types of federal funds.

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[3] The Solomon Amendment currently provides as follows: 167 (b) Denial of funds for preventing military recruiting on campus.--No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents-- (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or (2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution): (A) Names, addresses, and telephone listings. (B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student. 10 U.S.C. § 983(b).

[4] The Solomon Amendment applies to all institutions of higher education except those with "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2).

In 1990 the American Association of Law Schools (AALS) voted to include sexual orientation as a "protected category." Thus, virtually every law school now has a policy that states in substance:

> [The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation . . . .Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy.

See Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219, 225 (3d Cir. 2004) (hereafter "*FAIR*"). AALS also takes the position that the U.S. Armed Forces, in complying with an Act of Congress relating to the discipline of military personnel, discriminates on the basis of sexual orientation.[5]

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[5] In 1993 Congress enacted the "Don't Ask, Don't Tell" policy, codified at 10 U.S.C. § 654(b). That policy had never been found by a federal appellate court to be an unconstitutional abridgement of individuals' rights. *See, e.g. Richenberg v. Perry*, 73 F.3d 172 (8th Cir. 1995) ("We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in [10 U.S.C.] § 654(f)(3)(A).") *Accord Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (*en banc*), *cert. denied*, 519 U.S. 948 (1996); *Thorne v. United States Dept. of Defense*, 139 F.3d 893 (4th Cir. 1998); *Holmes v. California Army Nat. Guard*, 124 F.3d 1126 (9th Cir. 1997), *reh'g en banc denied*, 155 F.3d 1049 (9th Cir. 1998).

In September 2003, the Forum for Academic and Institutional Rights ("FAIR") (an association of certain law schools and law school faculties) and others brought this action against Secretary of Defense Donald R. Rumsfeld and other members of the President's administration (petitioners) in the United States District Court for the District of New Jersey, *FAIR* at 228, alleging, *inter alia*, that the Solomon Amendment violates the First Amendment rights of law schools. *FAIR* at 230. Respondents immediately applied for a temporary restraining order and moved for a preliminary injunction, both of which were denied by the District Court. *FAIR* at 228.

Applying the First Amendment standard of "intermediate scrutiny" for laws affecting expressive conduct, *see United States v. O'Brien*, 391 U.S. 367 (1968), the District Court held that the Solomon Amendment does not violate respondents' First Amendment rights. Pet. App. 161a-166a. The court found that the Solomon Amendment advances the important government interest in raising a volunteer military, *id.* at 162a-163a, that the military's recruitment effort would be less effective if its recruiters were denied equal access to campuses and their students, *id.* at 164a, and that the Solomon Amendment does not seek to suppress ideas. *Id.* at 165a-166a. The court emphasized that institutions are free to denounce the military's policies without risking the loss of federal funds. Id. at 166a.[6]

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[6] The District Court refused to dismiss the complaint for lack of standing. The District Court held, on the basis of the allegations in the complaint, that a broad range of plaintiffs in addition to FAIR, including individual students and faculty members, student organizations at two law schools, and a national association of law professors, had standing to challenge the

(continued...)

A divided panel of the Court of Appeals for the Third Circuit reversed. *FAIR* at 246. The panel majority held that respondents were likely to prevail on their claim that the Solomon Amendment violates the First Amendment, and directed the District Court to issue a preliminary injunction against enforcement of the Solomon Amendment. *Id.* The Court of Appeals equated the Solomon Amendment's funding condition with a direct regulatory mandate that institutions afford military recruiters equal access to their campuses and students and found that it imposed a penalty for not doing so. *Id.* at 229 n.9 and 230.

The Third Circuit further held that the Solomon Amendment is subject to strict scrutiny under the First Amendment because it both directly burdens the right of educational institutions to engage in expressive association[7], *FAIR* at 234, and implicates the compelled speech doctrine because it forces laws schools to propagate, accommodate, and subsidize a message with which they disagree. *Id.* at 240. In the Third Circuit's view, the Solomon Amendment requires law schools to convey the message that all employers are equal, and to facilitate the military's statements that homosexual applicants may not serve. *Id.* at 239.

The Third Circuit held that the government had failed to establish that no less restrictive alternative means for effective

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[6](...continued)
constitutionality of the Solomon Amendment. Pet. App. 84a86a, 103a-128a. Petitioners do not here challenge FAIR's standing. *See* Petition at 7, n.2.

[7] The court reasoned that the presence of military recruiters on campus would force law schools to send a message that they accept discrimination against homosexuals as a legitimate form of behavior. *Id.* at 232.

recruitment of military personnel existed, and suggested loan repayment programs and television and radio advertisements as two such alternatives. *FAIR* at 235

The Court of Appeals also concluded that respondents would be entitled to a preliminary injunction even if the *O'Brien* standard of "intermediate" (rather than strict) scrutiny were applicable. *FAIR* at 246. The court held that a denial of equal access to military recruiters involves expressive conduct, thereby requiring the government to prove that the Solomon Amendment enhances the military's recruitment effort in order to sustain its burden under *O'Brien*. *Id.* at 235.[8]

The government moved for a stay of mandate pending the filing of its *certiorari* petition. By order dated January 20, 2005, the Court of Appeals granted a stay and by order dated February 2, 2005 denied respondents' motion to reconsider the stay.

This Court granted *certiorari* on May 2, 2005.

SUMMARY OF ARGUMENT

Based upon centuries of collective experience, culminating in positions at the highest levels of military command, *amici* view a highly qualified, well-educated and effective officer corps as essential to the military's ability to fulfill its national security mission. Without the ability to recruit and train college and university educated individuals, the military cannot maintain the high quality of its officer corps. Recruiting educated men and women for its officer corps and enlisted ranks to further our

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[8] Judge Aldisert dissented. *FAIR* at 246. He applied the *O'Brien* standard and concluded that the Solomon Amendment is constitutional. *Id.* at 261-262.

compelling government interest in an effective military is, therefore, essential.

In enacting the Solomon Amendment Congress made the express judgment that on-campus recruiting is essential to maintaining an all-volunteer force. That judgment should be accorded particular deference. Congress has unique expertise in the conduct of the national defense and military affairs and the judiciary has acknowledged that it does not. *Gilligan v. Morgan*, 413 U.S. 1 (1973). The Court of Appeals' suggestions as to possible alternatives to on-campus military recruiting are merely speculative, impractical, and contrary to universal industry practices. They also reveal a profound ignorance of the military's current efforts to attract qualified candidates in addition to on-campus recruiting.

The Court of Appeals also applied an entirely incorrect analysis in assessing the Solomon Amendment's constitutionality. Contrary to the Third Circuit's holding, the Solomon Amendment neither impairs an educational institution's right to expressive association, nor does it compel such an institution to convey any message with which the institution disagrees. In short, the Solomon Amendment simply does not implicate the First Amendment's guarantees of freedom of speech and association.

Finally, even if First Amendment concerns were implicated by the Solomon Amendment's conditioning of the receipt of federal funding on providing equal access to military recruiters, the statute easily passes the applicable intermediate scrutiny test because it furthers the substantial governmental interest in "raising a military."

ARGUMENT

I.

THE GOVERNMENT'S COMPELLING NATIONAL SECURITY INTEREST IN AN EDUCATED AND CAPABLE OFFICER CORPS REQUIRES THE ABILITY TO RECRUIT ON CAMPUS

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981), quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964). Without educated officers the military's ability to function effectively and fulfill its mission to defend the nation is seriously undermined. *Amici*'s vast experience with the all-volunteer force informs their firm belief that effective recruitment from the broadest pool of available talent is essential to staff an all-volunteer military. The Solomon Amendment was drafted and adopted with these tenets in mind, and reflects Congress' judgment that equal access to college and university campuses is a crucial component of effective military recruitment.

This case does not merely involve the usual deference accorded legislative determinations. It arises "in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Chappell v. Wallace*, 462 U.S. 296, 301 (1988). This Court has recognized that ". . . .the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view." *Id.* at 300-301.

In contrast to Congress' broad constitutional power over military issues, this Court has acknowledged that the judiciary lacks competence with respect to these matters. "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Rostker v. Goldberg*, 453 U.S. 57, 64-66 (1981); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 n.5 (1953).

The Solomon Amendment rests on two strongly articulated judgments by the legislative branch. The first is that restrictions on military recruiting at colleges and universities interfere with "the Federal Government's constitutionally mandated function of raising a military." 141 Cong. Rec. 595 (1995) (Rep. Solomon).[9] The

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[9] Representative Solomon explained during the debate on the floor of the House:

> **[R]ecruiting is the key to our all-volunteer military forces** . . . . Recruiters have been able to enlist such promising volunteers for our armed forces by going into high schools and colleges and informing young people of the increased opportunities that a military tour or career can provide. That is why we need this amendment.

142 Cong. Rec. 16,860 (1996) (emphasis added).

Representative Goodlatte concurred:

> "Campus recruiting is a **vitally important**

(continued...)

second is that equal access is critical to effective military recruiting.[10]

The House Committee report on the 2004 amendment specifically requires equal access:

> ....Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs. Successful recruitment relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to other employers.

H.R. Rep. No. 443, 108th Cong., 2d Sess. Pt. 1, at 3-4 (2004).

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[9](...continued)
component of the military's effort to attract our Nation's best and brightest young people," and institutions that exclude military recruiters "interfere with the Federal Government's constitutionally mandated function of raising a military."

Id. at 12,712 (emphasis added).

[10] The text of the Solomon Amendment as originally enacted did not expressly refer to equal access. The Department of Defense interpreted the Act to condition federal funding on equal access and Congress amended the law in 2004 to ratify that interpretation. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811.

The primary sources for the nation's officer corps are the Reserve Officer Training Corps (ROTC)[11] (comprised of students enrolled at participating colleges and universities), the service academies, and college and university students who are not in ROTC programs. The military is particularly interested in those non-ROTC students who are pursuing advanced degrees in fields important to the military services, particularly law, medicine and engineering, where there is simply no alternative recruiting source other than universities.[12] Because of this reality, *amici*, as experienced military leaders, respectfully urge that the military simply cannot maintain the quality of its officer corps unless it retains its ability to recruit and train college and university-educated individuals.

The Third Circuit suggests that the military has real-world alternatives to on-campus recruiting of these high quality candidates, such as loan repayment programs and television and

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[11] Colleges and universities are the principal source of our military leadership. The service academies combined supply only about 15 percent of officers in all services. ROTC programs alone produce approximately 60 percent of all officers in the U.S. Armed Forces and 75 percent of U.S. Army officers. The balance comes primarily from college and university students who are not in ROTC programs. Banning military recruiters from campus also affects recruiting for the reserves and the National Guard, force components that are vital in times of active conflict, such as the present campaigns in Afghanistan and Iraq.

[12] The military has no means of educating doctors or lawyers, and must instead rely on law schools and medical schools. While the service academies train engineers, pilots and other technical personnel, they cannot do so in nearly the numbers necessary to staff the nation's defense forces adequately.

radio advertisements, *FAIR* at 235.[13] This speculative suggestion is contrary to the universal practice in the human resources field. No amount of Defense spending on advertising would offset the loss of the ability to "go to the customer" – in this case the nation's students – if access equal to that given other prospective employers is denied.

The job recruitment process and the various factors that influence a potential recruit's decision are not essentially different for the armed forces than for private sector employers. All prospective employers need to have personal contact with the pool of talent. Major law firms and corporations find it essential to recruit on campus and devote hundreds of thousands of dollars and thousands of hours to that process. Denying equal access to military recruiters puts our armed forces at a serious – in many cases decisive – competitive disadvantage. Banning military recruiters from campus similarly affects recruiting for the reserves and the National Guard, force components that are vital in times of active conflict, such as the present campaigns in Afghanistan and Iraq. If alternatives imagined by the Third Circuit were effective

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[13] Each of the branches of the military already commits significant resources and efforts on advertising on television, radio and print media, and they all devote significant human resources to other programs to increase the pool of qualified officer candidates and enlisted personnel. On average, the armed forces spends in excess of $1 billion a year on these programs, roughly split evenly between recruiting and advertising. *See* Department of Defense Budget at http://www.dod.mil/comptroller/defbudget/fy2006/ and the Appendix, which contains a summary chart showing military expenditures for recruitment and advertising in the past several fiscal years and excerpts from a Department of Defense public website containing the raw data on which the chart is based.

and sufficient, private employers would not devote substantial time or resources to on-campus recruiting.

In short, *amici* know of no practical and effective alternative to campus recruiting that can fulfill the military's and the nation's compelling need for a well-educated and highly trained officer corps of the highest quality to serve the country.

II.

THE COURT OF APPEALS' CONSTITUTIONAL ANALYSIS IS FUNDAMENTALLY FLAWED

The Court of Appeals incorrectly held that the Solomon Amendment implicates the First Amendment because it interferes with expressive association and compels speech.. The Solomon Amendment does neither, and the Third Circuit's entire First Amendment analysis is inapposite.

The equal access condition applies only if institutions ***voluntarily*** choose to receive the specified federal funding. Any institution is at liberty to forego this funding if it concludes that granting equal access to military recruiters "associates" that institution with a congressionally mandated policy with which it disagrees. Because the receipt of federal funds is not compulsory, and because no institution is compelled to provide access to potential employers, there is no compelled association.

The Solomon Amendment does not even force institutions that choose to accept federal funds to provide a minimum or predetermined level of access. Rather, it simply requires institutions to grant military recruiters the same access to their facilities and students as they give to other outside employers. Finally, the Solomon Amendment does not ask the institutions to

adopt any statements made by military recruiters as their own. [14] Institutions that voluntarily accept federal funding remain free to protest the military's policies as publicly and as vigorously as they wish and to make clear that they do not agree with those policies.

A. The Solomon Amendment Does Not Interfere with Expressive Association and Does Not Compel Speech.

The Court of Appeals held that the Solomon Amendment interferes with expressive association and compels speech, triggering the application of strict scrutiny under the First Amendment. The decision should be reversed, because both the threshold holding and the level of scrutiny applied by the Third Circuit were incorrect.

1. The Solomon Amendment Does Not Impair A School's Right to Expressive Association.

Relying on *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), the Court of Appeals held that the Solomon Amendment impairs a law school's right to expressive association. *FAIR* at 230. Reliance on *Dale*, which invalidated a state law that required the Boy Scouts to accept gay men as scout leaders, is misplaced for several reasons.

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[14] Military recruiters do not seek access to campuses for the purpose of advocating discrimination against homosexuals. To the contrary, the "Don't ask, Don't tell" policy expressly prohibits military recruiters from discussing a potential recruit's sexual preferences. 10 U.S.C. § 654(d). Rather, the recruiters seek to promote service in the nation's military and to present information about the various options and benefits of such service.

First, unlike the law struck down in *Dale*, the Solomon Amendment does not burden a school's right to expressive association. In fact, the statute is entirely unconcerned with an institution's internal composition and organization.

Second, unlike the scout leader in *Dale*, military recruiters are not a part of the educational institution itself, and do not become so through their recruiting activities. The statute in *Dale* sought to impose substantive standards on the organization's personnel and leadership policies. In contrast, the role of recruiters is simply to attract students to service in the armed forces, an organization clearly separate and apart from the school. In this regard, the military recruiters are no different from law firm partners or corporate executives who recruit on campus. Once an institution has chosen to establish an on-campus recruiting process, the Solomon Amendment requires only that military recruiters be afforded access to that process equal to that given to representatives of other employers.

Third, unlike the New Jersey law at issue in *Dale*, the Solomon Amendment does not compel an institution to adopt or state, even implicitly, a position that is inconsistent with its underlying or fundamental beliefs. A scout leader's integral relationship with Boy Scouts and the Boy Scout organization could hardly be more different from a military recruiter's transient relationship with university students and the university. A scout leader is not only a permanent and integral official of the Boy Scout organization, but is the single most important role model who purports to speak for that organization, and has direct, frequent and personal contact with adolescent boys.

By contrast, visiting recruiters, whether working on behalf of military or civilian employers, speak only for the employers they represent. They do not purport to speak for the educational

institutions that they visit and no reasonable person would believe otherwise. It is apparent to students and the community that recruiters are "outsiders" on campus. Thus there is no serious risk that the laws and policies governing the armed forces could mistakenly be seen by students, faculty or the community as reflecting the views of the school.

No one would assume that a law school, for example, endorses any particular "message" that some might perceive to be inherent in the work performed by each of the many other prospective employers who visit the campus to recruit, including law firms, corporate legal departments, public interest groups that span the ideological spectrum, and civilian government agencies.[15] Indeed, such a notion is inherently illogical, because recruiting employers include a variety of entities, whose philosophical and political views (and those of their clients, executives, customers and officials) cover the entire ideological spectrum, espousing views that are either shared or rejected by different students or faculty members. Even if this were not so, any school wishing to ensure that faculty, students or the outside world will not mistakenly perceive that the institution endorses the policies or actions of the U.S. military (or other recruiting employers), would be free to publicize its disclaimers or express its disagreement with any policy or any recruiting organization.[16]

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[15] It cannot seriously be argued , for example, that the law school or outside communities believe that positions taken by recruiting law firms in cases the firms litigate reflect the political or philosophical beliefs of the faculty, administration or student body.

[16] Unlike the youthful members of the Boy Scouts in *Dale*, university students and faculty are exceptionally mature, and

(continued...)

2. The Court of Appeals' Compelled Association Analysis Is Flawed.

The argument advanced by the Third Circuit that the Solomon Amendment impermissibly intrudes into an educational institution's freedom of association is likewise flawed because no educational institution has been compelled by virtue of the Solomon Amendment to do anything.

Schools that voluntarily choose to accept federal funds and to enter into grant agreements or contracts with the United States agree to numerous conditions. For example, a school cannot receive federal funds if it discriminates in hiring on the basis of race, gender or disability. Such conditions, particularly those that require a government contractor to abide by various laws, are commonplace and legal, and are often explicitly mandated by law. It simply does not follow that permitting military recruiters equal access can rationally be interpreted as a school's agreement with any governmental policy.

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[16](...continued)
function in a setting in which ideas are vigorously debated, attacked and defended, and in which a respect for diverse views is supposedly encouraged. The university is peculiarly the "marketplace of ideas" (*Keyishian v. Board of Regents*, 385 U.S. 589 (1967)) and the free exchange of diverse viewpoints is supposed to be a fundamental element of their education. *See Healy v. James*, 408 U.S. 169 (1972). There is no reason to believe that the presence of military recruiters on campus threatens such an environment. To the contrary, the exclusion of military recruiters or others who do not espouse the views of certain university faculties or administrations constrains the "marketplace of ideas" in favor of a paternalistic notion that university students require protection from "dangerous ideas" or different and "unacceptable" viewpoints.

Schools wishing to distance themselves from statutory military policies and to send a clear message about what the faculty and administration think about such policies, have several options. They may decline government funding and publicize their reasons for doing so. They may allow equal access and publicize their disagreement with a particular policy. Or they may seek to change the law through the democratic process.

3. The Solomon Amendment Does Not Implicate the Compelled Speech Doctrine.

The compelled speech doctrine is triggered when the government compels a speaker to convey a message that is at odds with the speaker's beliefs. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997). The Solomon Amendment, however, does not compel any speech or action. It surely does not require law schools or universities to convey any particular message antagonistic to their beliefs.

As noted, if a school is concerned that the presence of military recruiters, among the many other employers visiting its campus, might mistakenly send any general or particular message that the school does not wish to convey – such as an implicit endorsement of the "Don't ask, Don't tell" policy that troubled the Third Circuit, *FAIR* at 239 – the school is free to communicate its views as strongly as it wishes and can do so easily by stating that it does not endorse the mandate of federal law or the military's adherence to it.[17] *See Pruneyard Shopping Ctr. v. Robins*, 447

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[17] Even accepting, *arguendo*, the Court of Appeals' strained premise that military recruiters, solely by visiting the campus, cause law schools to make a "statement" that openly homosexual students

(continued...)

U.S. 74, 87 (1980) (compelled speech doctrine inapplicable where property is not reserved for personal use; views of speakers unlikely to be attributed to property owner, who can effectively correct any such incorrect impression through its own speech).

The Third Circuit's holding that law schools "object to conveying the message that all employers are equal," *FAIR* at 239, is particularly inexplicable. A law school that affords military recruiters equal access consistent with the Solomon Amendment conveys no such message. Indeed, "equal access" should convey nothing whatsoever about the institution's views about any employer. If anything, an inclusive on-campus job recruiting program conveys only the message that the law school treats the prospective employers equally, and is facilitating students' choice among a broad range of employment options available to students, without making any judgment about any particular employer.[18]

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[17](...continued)
are ineligible for military service, *FAIR* at 239, such a statement would simply report an objective fact about the law and the congressionally mandated qualifications for military service. It would be nothing more or less than an accurate statement of the law. Summarizing legal requirements is hardly equivalent to endorsing those laws. Surely the law faculty would want the students to know what the law is. A law school could not perform its core function if its faculty were to refrain from discussing laws or court decisions that they deem unwise. Indeed, an essential part of law school education is the critical analysis of statutes, regulations and court decisions, and the open discussion of differing views of them. In fact, law faculty criticize existing law in virtually every class.

[18] Even assuming, hypothetically, that granting equal access to military recruiters conveys a message of any kind about the university's views or values, interpreting the university's action as
(continued...)

Even if the presence of military recruiters on campus were deemed to be speech, it would be "government speech," and this Court's recent decision ion *Johanns v. Livestock Marketing Board*, ___ U.S. ___, 125 S.Ct. 2055 (2005) would compel the conclusion that there is no First Amendment violation in requiring a school to facilitate such speech (""Compelled support of the government' is of course perfectly constitutional. . . ." ___ U.S. at ___, 125 S.Ct. at 2062 (citation omitted).

B. The Solomon Amendment is Valid Under "Intermediate Scrutiny" Standards.

The Court of Appeals held that even if the rights of expressive association and free speech were not implicated, the Solomon Amendment would be subject to review under the "intermediate scrutiny" standard for the regulation of expressive conduct set forth in *O'Brien*. The holding that the Solomon Amendment does not, on the existing record, satisfy *O'Brien*'s standard of "intermediate scrutiny," *FAIR* at 243-246, is simply wrong.

Indeed, in *O'Brien* this Court made it clear that it has "not accept[ed] the view than an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376.[19]

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[18](...continued)
a desire for federal funding is as logical as viewing it as an endorsement the "Don't ask, Don't tell" law.

[19] Indeed, as this Court has held "[i]t is possible to find some kernel of expression in almost every activity a person undertakes – (continued...)

Even if granting or denying equal access to military recruiters from campus were sufficiently expressive to come within the scope of the First Amendment, regulation of conduct that imposes an incidental burden on expression is constitutional so long as it furthers a substantial governmental interest that is "unrelated to the suppression of free expression," *O'Brien*, 391 U.S. at 377, and that "would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

The government's compelling interest in recruiting qualified men and women for military service is entirely unrelated to the suppression of expression.

The Court of Appeals held that respondents are entitled to a preliminary injunction under *O'Brien* because the government did not present evidence in court to prove that the Solomon Amendment enhances military recruiting efforts. *FAIR* at 245. This was unnecessary because the decisions and actions of the educational institutions themselves amply demonstrate that on-campus recruiting is essential for effective recruiting by employers and for providing broad employment opportunities for students.

When the university itself allows recruiters to conduct on-campus interviews, provides interview facilities, makes employers' literature available in the placement office or elsewhere on campus, and offers recruiters assistance in scheduling interviews, the school is manifesting its own judgment that it is necessary and appropriate for employers to reach potential recruits in an effective manner. When the university denies those same

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[19](...continued)
for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel of expression is not sufficient to bring the activity within the protection of the First Amendment." *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

opportunities to military recruiters, it is depriving the military of access that the university itself deems essential or important for effective recruiting. The educational institution's own actions thus furnish the evidentiary basis finding that access to campus is essential for effective recruiting, and that denial of that access undermines an essential aspect of raising a military. As senior military leaders with decades of experience in recruiting and training members of the armed forces, *amici* are certain that on-campus recruiting is essential to maintaining an effective all-volunteer military.

If on-campus recruitment were deemed unnecessary or ineffective, law schools and other university faculties or departments would not tolerate the administrative burden of administering a campus job recruiting program. Similarly, employers would not incur the significant costs incident to participating in the on-campus recruiting process if they did not deem such participation important in meeting their staffing needs.

To the extent anything beyond the schools' own decisions and common sense are required to confirm that equal access to campus recruiting for military recruiters is necessary, Congress has made that judgment in enacting the Solomon Amendment's funding condition. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) (the government is not required, in response to Free Exercise Clause claim, to offer evidentiary support for challenged military dress regulations). As discussed in Point I, *supra*, that Congressional judgment is entitled to heightened deference.

CONCLUSION

The decision of the Court of Appeals should be reversed, and the case should be dismissed.

Respectfully submitted,

MARTIN S. KAUFMAN*
* *Counsel of Record*
Atlantic Legal Foundation
60 East 42nd Street
New York, NY 10165
(212) 867-3322
Counsel for Amici Curiae

Of Counsel:

JOE R. REEDER
PHILIP R. SELLINGER
JOHN P. EINWECHTER
Greenberg Traurig
800 Connecticut Ave. N.W.
Washington, DC 20006
(202) 331-3100

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APPENDIX

STATISTICAL INFORMATION ON MILITARY EXPENDITURES FOR RECRUITMENT AND ADVERTISING

Military Expenditures - Recruiting and Advertising

FY2001-FY2006 - Summary

RECRUTING

	FY 2001 Actual	FY 2002 Actual	FY 2003 Actual	FY 2004 Actual	FY 2005 Estimate	FY 2006 Estimate
Army	245.5	233.1	280.3	254	253.4	299.8
Navy	131.8	125.5	165.4	151.1	179.2	198.7
Marine Corps	62.9	63.2	69.9	67.8	64.7	70.4
Air Force	66.6	61.4	127.6	63.6	61.5	64.4
Army Reserve	48.2	40.6	42.6	38.9	35.6	30.9
Navy Reserve	20.4	18.1	14.5	16.3	N/A	N/A
Marine Corps Reserve	4.9	5.3	5.2	4.7	4.8	4.8
Air Force Reserve	6.1	6.5	7.3	7.2	5.3	5.3
Army National Guard	35.4	30.6	43.9	37.7	31.4	48.2
Air National Guard	3.4	4.5	4.5	4.1	3.6	3.7
Total	**625.2**	**588.8**	**761.2**	**645.4**	**639.5**	**726.2**

ADVERTISING

	FY 2001 Actual	FY 2002 Actual	FY 2003 Actual	FY 2004 Actual	FY 2005 Estimate	FY 2006 Estimate
Army	143.9	216.2	196.6	201.7	200.7	182.2
Navy	94.5	102.7	89.1	83	100.3	83.7
Marine Corps	46.1	47.1	44.5	45.7	47.5	45.1
Air Force	75.3	87.8	17.4	76	55.6	72.2
Defense-Wide	24	7.6	23.4	14.3	24.2	7.2
Army Reserve	35.5	48.3	50.8	63.2	54.7	57.5
Navy Reserve	4.2	6.5	7.9	7.5	N/A	N/A
Marine Corps Reserve	4.9	2.8	3	3.1	3.1	3.3
Air Force Reserve	9.5	11.9	21	12.5	9.1	10.5
Army National Guard	48.9	54.1	62.3	122.1	69.8	76.4
Air National Guard	16.1	10.9	18.8	16.2	5.7	5.8
Total	**502.9**	**595.9**	**534.8**	**645.3**	**570.7**	**543.9**

RECRUITING, ADVERTISING, AND EXAMINING

Overall funding in recruiting, advertising, and examining provides support for recruiting commands and stations throughout the United States; for local, regional, and national advertising to support the procurement and retention of quality enlisted and officer personnel; and for the U.S. Military Entrance Processing Command (MEPCOM), which includes the Military Entrance Processing Stations (MEPS) that process all enlisted personnel entering on active duty.

($ in Millions)

	FY 2002 Actual	Price Growth	Program Growth	FY 2003 Estimate	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	525.6	+9.3	-3.4	531.5	+8.8	+11.0	551.3	+9.9	+5.2	566.4
Navy	228.2	+8.9	+8.8	245.9	+7.1	-1.6	251.4	+7.5	-4.0	254.9
Marine Corps	110.3	+2.1	+5.2	117.6	+1.8	-4.2	115.2	+2.0	-1.1	116.1
Air Force	151.6	+2.1	+0.4	154.1	+2.4	-2.7	153.8	+2.8	+3.7	160.3
Defense-Wide	7.6	+0.1	+18.0	25.7	+0.4	-18.4	7.7	+0.1	+0.3	8.1
Defense Health Program	31.2	+0.7	-	31.9	+0.8	-0.1	32.6	+0.9	-0.2	33.3
Army Reserve	88.9	+1.7	-0.5	90.0	+1.3	+11.4	102.7	+1.6	+3.3	107.6
Navy Reserve	24.6	+0.4	-2.4	22.6	+0.4	+1.7	24.7	+0.4	+0.3	25.4
Marine Corps Reserve	8.1	+0.1	-	8.2	+0.1	-0.1	8.2	+0.1	--	8.3
Air Force Reserve	18.4	+0.2	-0.1	18.5	+0.3	-4.6	14.2	+0.3	+0.1	14.6
Army National Guard	84.7	+1.2	+1.6	87.5	+1.4	+7.6	96.5	+1.6	-11.8	86.3
Air National Guard	15.4	+0.2	-5.9	9.7	+0.2	-0.2	9.7	+0.2	-0.2	9.7
Total	1,294.6	+27.0	+21.7	1,343.2	+25.0	-0.2	1,368.0	+27.4	-4.5	1,391.0

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RECRUITING, ADVERTISING, AND EXAMINING

RECRUITING

The recruiting funds provide support for recruiting commands and stations throughout the United States. Recruiting costs are for those items essential to the accomplishment of the recruiting mission, including meals, lodging, and travel of applicants; recruiter expenses, travel and per diem; civilian pay; vehicle operation and maintenance; lease of office space; and other incidental expenses necessary to support the recruiting mission. The FY 2004 Recruiting program reflects a net increase of $19.7 million. Of this amount, $14.4 million is for price growth and $5.3 million (0.8 percent) is for net program growth.
The following tables provide the funding by Component for each category.

RECRUITING

($ in Millions)

	FY 2002 Actual	Price Growth	Program Growth	FY 2003 Estimate	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	233.1	+4.1	+17.7	254.9	+7.4	+2.9	265.2	+4.6	+4.5	274.3
Navy	125.5	+5.1	+8.3	138.9	+3.7	+0.8	143.4	+4.2	-4.1	143.5
Marine Corps	63.2	+1.3	+6.6	71.1	+1.1	-5.7	66.5	+1.1	-1.2	66.4
Air Force	61.4	+1.1	-1.9	60.6	+1.0	+3.3	64.9	+1.3	-0.1	66.1
Army Reserve	40.6	+0.8	-1.6	39.8	+0.6	-0.9	39.5	+0.7	+2.9	43.1
Navy Reserve	18.1	+0.3	-3.2	15.2	+0.3	+1.7	17.2	+0.3	+0.4	17.9
Marine Corps Reserve	5.3	+0.1	-0.1	5.3	+0.1	-0.1	5.3	+0.1	--	5.4
Air Force Reserve	6.5	--	-1.5	5.0	+0.1	--	5.1	+0.1	+0.2	5.4
Army National Guard	30.6	+0.5	+8.2	39.4	--	+3.6	43.0	+0.8	-0.1	43.7
Air National Guard	4.5	+0.1	-0.7	3.9	+0.1	-0.3	3.7	+0.1	-0.1	3.7
Total	588.8	+13.4	+31.8	634.1	+14.4	+5.3	653.8	+13.3	+2.4	669.5

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RECRUITING, ADVERTISING, AND EXAMINING

ADVERTISING

The advertising funds provide for local, regional, and national advertising to support the procurement and retention of quality enlisted and officer personnel. All advertising is designed to increase public awareness, portray opportunities, and generate recruit leads. The Services fund a media mix of advertising that includes television and radio; magazines and newspapers; direct mail campaigns; and recruiting booklets, pamphlets, and posters. The Operation and Maintenance (O&M), Defense-Wide appropriation funds common services for the Active and Reserve Components to include providing consolidated lead lists and direct mail campaigns. The FY 2004 Advertising program reflects a net increase of $0.7 million. This amount reflects the net sum of $8.0 million for price growth, partially offset by a net program decrease of $7.3 million (-1.2 percent).

ADVERTISING

($ in Millions)

	FY 2002 Actual	Price Growth	Program Growth	FY 2003 Estimate	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	216.2	+3.1	-22.4	196.9	-0.3	+6.2	202.8	+3.5	+3.0	209.3
Navy	102.7	+3.8	+0.5	107.0	+3.4	-2.4	108.0	+3.3	+0.1	111.4
Marine Corps	47.1	+0.8	-1.4	46.5	+0.7	+1.5	48.7	+0.9	+0.1	49.7
Air Force	87.8	+1.0	+1.7	90.5	+1.3	-6.0	85.8	+1.4	+4.1	91.3
Defense-Wide	7.6	+0.1	+18.0	25.7	+0.4	-18.4	7.7	+0.1	+0.2	8.1
Army Reserve	48.3	+0.9	+1.1	50.2	+0.7	+12.3	63.2	+0.9	+0.4	64.5
Navy Reserve	6.5	+0.1	+0.8	7.4	+0.1	--	7.5	+0.1	-0.1	7.5
Marine Corps Reserve	2.8	+0.1	--	2.9	--	--	2.9	--	--	2.9
Air Force Reserve	11.9	+0.2	+1.4	13.5	+0.2	-4.6	9.1	+0.1	--	9.2
Army National Guard	54.1	+0.7	-6.6	48.2	+1.4	+4.0	53.6	+0.8	-11.7	42.6
Air National Guard	10.9	+0.1	-5.2	5.8	+0.1	+0.1	6.0	+0.1	-0.1	6.0
Total	595.9	+10.9	-12.1	594.6	+8.0	-7.3	595.3	+11.2	-4.0	602.5

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RECRUITING, ADVERTISING, AND EXAMINING

Overall funding in recruiting, advertising, and examining provides support for recruiting commands and stations throughout the United States for local, regional, and national advertising to access and retain quality enlisted and officer personnel. It provides for the U.S. Military Entrance Processing Command (MEPCOM), which includes the Military Entrance Processing Stations (MEPS) that process all enlisted personnel entering on active duty. Overall funding in recruiting, advertising, and examining increases from $1,338.1 million in FY 2004 to $1,395.6 million in FY 2005, which is a net increase of $57.5 million above the FY 2004 level. Of this amount, $24.4 million is for price growth and $33.1 million (2.5 percent) is for net program growth.

RECRUITING, ADVERTISING, AND EXAMINING
($ in Millions)

	FY 2003 Actual	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	558.0	10.7	-26.1	542.6	8.0	41.8	592.4
Navy	254.5	9.4	-33.4	230.5	8.0	44.0	282.5
Marine Corps	114.4	1.7	-3.8	112.3	1.7	-	114.0
Air Force	147.7	3.3	-6.0	145.0	2.1	-0.4	146.7
Defense Health Program	34.3	0.9	-3.8	31.4	0.6	1.2	33.2
Defense-Wide	23.4	0.4	-9.2	14.6	0.1	4.0	18.7
Army Reserve	93.4	1.3	8.0	102.7	1.5	-13.9	90.3
Navy Reserve	22.4	0.4	0.9	23.7	0.4	-24.1	0.0
Marine Corps Reserve	8.2	0.1	-0.2	8.1	0.1	-0.2	8.0
Air Force Reserve	28.3	0.6	-14.6	14.1	0.2	0.3	14.6
Army National Guard	106.2	1.6	-4.3	103.5	1.6	-19.3	85.8
Air National Guard	23.3	0.4	-14.1	9.6	0.1	-0.3	9.4
Total	1,414.1	+30.6	-106.6	1,338.1	+24.4	+33.1	1,395.6

http://www.defenselink.mil/comptroller/defbudget/fy2005/fy2005_overview.pdf

RECRUITING, ADVERTISING, AND EXAMINING

The following tables provide the funding by Component for each category.

Recruiting

The recruiting mission is to maintain the highest quality force possible. The recruiting funds provide support for recruiting commands and stations throughout the United States. Recruiting costs are for those items essential to the accomplishment of the recruiting mission, including meals, lodging, and travel of applicants; recruiter expenses, travel and per diem; civilian pay; vehicle operation and maintenance; lease of office space; and other incidental expenses necessary to support the recruiting mission. The FY 2005 recruiting program reflects a net increase of $13.5 million. Of this amount, $7.1 million is for price growth and $6.4 million (1 percent) is for net program growth.

RECRUITING
($ in Millions)

	FY 2003 Actual	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	280.3	+2.2	-24.2	258.3	+0.2	+2.1	260.6
Navy	165.4	+4.3	-22.2	147.5	+2.8	+31.4	181.7
Marine Corps	69.9	+1.1	-6.9	64.1	+1.1	-0.3	64.9
Air Force	127.6	+3.0	-69.5	61.1	+1.0	+0.9	63.0
Army Reserve	42.6	+0.5	-3.6	39.5	+0.6	-3.1	37.0
Navy Reserve	14.5	+0.3	+1.5	16.3	+0.3	-16.6	0.0
Marine Corps Reserve	5.2	-	-0.2	5.0	+0.1	-0.2	4.9
Air Force Reserve	7.3	+0.2	-2.4	5.1	+0.1	+0.2	5.4
Army National Guard	43.9	+0.7	+5.8	50.4	+0.8	-7.8	43.4
Air National Guard	4.5	+0.1	-0.9	3.7	+0.1	-0.2	3.6
Total	761.2	+12.4	-122.6	651.0	+7.1	+6.4	664.5

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Advertising

The advertising funds provide for local, regional, national and corporate advertising to access quality enlisted and officer personnel. All advertising is designed to increase public awareness and describe employment opportunities. The Services fund a media mix of advertising that includes television and radio; magazines and newspapers; internet websites and banner advertising; informational videos; direct mail campaigns; and recruiting booklets, pamphlets, and posters. The Operation and Maintenance (O&M), Defense-Wide appropriation funds a joint program managed by the Defense Human Resources Field Activity. This program consists of a corporate campaign for joint service recruiting and advertising, market research and studies, and survey requirements for the Active and Reserve Components. This joint funding is used for consolidated lead lists, direct mail campaigns, youth and adult influencer public opinion polls, and Selective Service System direct market mailings. The FY 2005 Advertising program reflects a net decrease of $7.3 million. This amount is the net sum of $14.9 million for price growth and a $22.2 million (3.8 percent) net program decrease.

ADVERTISING
($ in Millions)

	FY 2003 Actual	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	196.6	+5.9	-	202.5	+6.1	-8.0	200.6
Navy	89.1	+5.1	-11.2	83.0	+5.2	+12.6	100.8
Marine Corps	44.5	+0.6	+3.1	48.2	+0.6	+0.3	49.1
Air Force	17.4	+0.2	+63.1	80.7	+1.0	-1.3	80.4
Defense-Wide	23.4	+0.4	-9.2	14.6	+0.1	+4.0	18.7
Army Reserve	50.8	+0.8	+11.6	63.2	+0.9	-10.8	53.3
Navy Reserve	7.9	+0.1	-0.6	7.4	+0.1	-7.5	0.0
Marine Corps Reserve	3.0	+0.1	-	3.1	-	-	3.1
Air Force Reserve	21.0	+0.2	-12.2	9.0	+0.1	+0.1	9.2
Army National Guard	62.3	+0.9	-10.1	53.1	+0.8	-11.5	42.4
Air National Guard	18.8	+0.3	-13.2	5.9	-	-0.1	5.8
Total	534.8	+14.6	+21.3	570.7	+14.9	-22.2	563.4

RECRUITING, ADVERTISING, AND EXAMINING

Overall funding in recruiting, advertising, and examining provides support for recruiting commands and stations throughout the United States for local, regional, and national advertising to access and retain quality enlisted and officer personnel. It provides for the U.S. Military Entrance Processing Command (MEPCOM), which includes the Military Entrance Processing Stations (MEPS) that process all enlisted personnel entering on active duty. Overall funding in recruiting, advertising, and examining increases from $1,375.7 million in FY 2005 to $1,433.1 million in FY 2006, which is a net increase of $57.4 million above the FY 2005 level. Of this amount, $28.9 million is for price growth and $28.5 million (2.1 percent) is for net program growth.

RECRUITING, ADVERTISING, AND EXAMINING
($ in Millions)

	FY 2004 Actual	Price Change	Program Change	FY 2005 Estimate	Price Change	Program Change	FY 2006 Estimate
Army	561.5	+11.1	+10.7	583.3	+11.6	+9.0	603.9
Navy	234.1	+5.9	+39.5	279.5	+6.4	-3.5	282.4
Marine Corps	113.5	+0.4	-1.7	112.2	+2.3	+1.0	115.5
Air Force	142.1	+2.9	-24.8	120.2	+2.7	+17.1	140.0
Defense Health Program	32.3	+0.8	+0.1	33.2	+0.8	+3.7	37.7
Defense-Wide	14.3	+0.3	+9.6	24.2	+0.5	-17.5	7.2
Army Reserve	102.1	+1.8	-13.6	90.3	+1.8	-3.7	88.4
Navy Reserve	23.8	-	-	-	-	-	-
Marine Corps Reserve	7.8	+0.1	-	7.9	+0.2	-	8.1
Air Force Reserve	19.7	+0.4	-5.7	14.4	+0.3	+1.1	15.8
Army National Guard	159.8	+3.2	-61.8	101.2	+2.1	+21.3	124.6
Air National Guard	20.3	+0.4	-11.4	9.3	+0.2	-	9.5
Total	1,431.3	+27.3	-59.1	1,375.7	+28.9	+28.5	1,433.1

http://www.defenselink.mil/comptroller/defbudget/fy2006/fy2006_overview.pdf

RECRUITING, ADVERTISING, AND EXAMINING

The following tables provide the funding by Component for each category.

Recruiting

The recruiting mission is to maintain the highest quality force possible. The recruiting funds provide support for recruiting commands and stations throughout the United States. Recruiting costs are for those items essential to the accomplishment of the recruiting mission, including meals, lodging, and travel of applicants; recruiter expenses, travel and per diem; civilian pay; vehicle operation and maintenance; lease of office space; and other incidental expenses necessary to support the recruiting mission. The FY 2006 recruiting program reflects a net increase of $86.7 million. Of this amount, $13.6 million is for price growth and $73.1 million (11.4 percent) is for net program growth.

RECRUITING
($ in Millions)

	FY 2004 Actual	Price Change	Program Change	FY 2005 Estimate	Price Change	Program Change	FY 2006 Estimate
Army	254.0	+4.4	-5.0	253.4	+5.0	+41.4	299.8
Navy	151.1	+4.2	+23.9	179.2	+4.3	+15.2	198.7
Marine Corps	67.8	+0.2	-3.3	64.7	+1.3	+4.4	70.4
Air Force	63.6	+1.3	-3.4	61.5	+1.4	+1.5	64.4
Army Reserve	38.9	+0.7	-4.0	35.6	+0.7	-5.4	30.9
Navy Reserve	16.3	-	-	-	-	-	-
Marine Corps Reserve	4.7	+0.1	-	4.8	-	-	4.8
Air Force Reserve	7.2	+0.2	-2.1	5.3	+0.1	-0.1	5.3
Army National Guard	37.7	+0.8	-7.1	31.4	+0.7	+16.1	48.2
Air National Guard	4.1	+0.1	-0.6	3.6	+0.1	-	3.7
Total	645.4	+12.0	-1.6	639.5	+13.6	+73.1	726.2

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RECRUITING, ADVERTISING, AND EXAMINING

Advertising

The advertising funds provide for local, regional, national and corporate advertising to access quality enlisted and officer personnel. All advertising is designed to increase public awareness and describe employment opportunities. The Services fund a media mix of advertising that includes television and radio; magazines and newspapers; internet websites and banner advertising; informational videos; direct mail campaigns; and recruiting booklets, pamphlets, and posters. The Operation and Maintenance (O&M), Defense-Wide appropriation funds a joint program managed by the Defense Human Resources Activity. This program consists of a corporate campaign for joint service recruiting and advertising, market research and studies, and survey requirements for the Active and Reserve Components. This joint funding is used for consolidated lead lists, direct mail campaigns, youth and adult influencer public opinion polls, and Selective Service System direct market mailings. The FY 2006 Advertising program reflects a net decrease of $26.8 million. This amount is the net sum of $11.8 million for price growth and a $38.6 million (6.8 percent) net program decrease.

ADVERTISING
($ in Millions)

	FY 2004 Actual	Price Change	Program Change	FY 2005 Estimate	Price Change	Program Change	FY 2006 Estimate
Army	201.7	+3.5	-4.5	200.7	+4.0	-22.5	182.2
Navy	83.0	+1.7	+15.6	100.3	+2.1	-18.7	83.7
Marine Corps	45.7	+0.2	+1.6	47.5	+1.0	-3.4	45.1
Air Force	76.0	+1.5	-21.9	55.6	+1.2	+15.4	72.2
Defense-Wide	14.3	+0.3	+9.6	24.2	+0.5	-17.5	7.2
Army Reserve	63.2	+1.1	-9.6	54.7	+1.1	+1.7	57.5
Navy Reserve	7.5	-	-	-	-	-	-
Marine Corps Reserve	3.1	-	-	3.1	+0.2	-	3.3
Air Force Reserve	12.5	+0.2	-3.6	9.1	+0.2	+1.2	10.5
Army National Guard	122.1	+2.4	-54.7	69.8	+1.4	+5.2	76.4
Air National Guard	16.2	+0.3	-10.8	5.7	+0.1	-	5.8
Total	645.3	+11.2	-78.3	570.7	+11.8	-38.6	543.9

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SUPREME COURT, U.S.

(24)

No. 04-1152

In the Supreme Court of the United States

DONALD H. RUMSFELD, ET AL., PETITIONERS,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Professors William Alford, William Andrews, David Barron, Elizabeth Bartholet, Robert Clark, Christine Desan, Charles Donahue, Richard Fallon, Jody Freeman, Gerald Frug, Heather Gerken, Ryan Goodman, Lani Guinier, Daniel Halperin, Bruce Hay, Philip Heymann, Elena Kagan, David Kennedy, Duncan Kennedy, Randall Kennedy, Reinier Kraakman, Kenneth Mack, Dan Meltzer, Frank Michelman, Martha Minow, Robert Mnookin, Todd Rakoff, Frank Sander, David Shapiro, Joseph Singer, Carol Steiker, Henry Steiner, Guhan Subramanian, Laurence Tribe, Elizabeth Warren, Paul Weiler, Lloyd Weinreb, Lucie White, David Wilkins, and Bernard Wolfman as *Amici Curiae* in Support of Respondents

WALTER DELLINGER
Counsel of Record
PAMELA HARRIS
TOBY HEYTENS
NICOLE SAHARSKY*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Illinois only*

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INTEREST OF *AMICI CURIAE*[1]

Amici are full-time faculty members at the Harvard Law School.[2] We are deeply committed to a fundamental moral principle: "A society that discriminates based on sexual orientation—or that tolerates discrimination by its members—is not a just society." App. 149 (Memorandum from then-Dean Robert C. Clark to the Harvard Law School Community). Our goal is to vindicate Harvard Law School's right to apply its evenhanded antidiscrimination policy to all recruiters—including those from the United States military—in harmony with the numerous federal, state, and local laws that outlaw various forms of discrimination by private actors.[3]

INTRODUCTION

The points we make in this brief are simple but perhaps surprising. *First*, the Solomon Amendment's prohibition on funding is triggered only by policies that target the military or its recruiters for disfavored treatment. *Second*, once it is understood that evenhanded recruiting policies are beyond the statute's ken, it is clear that Harvard Law School is in full compliance—and the same is likely true of the vast majority of United States law schools.

The events that gave rise to this litigation involve law schools' insistence that they will assist only those employers that pledge not to discriminate against the law schools' stu-

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission.

[2] Elena Kagan signs this brief in her capacity as a Professor of Law.

[3] Dean Clark's August 23, 2002, Memorandum to the Harvard Law School Community describes the culmination of threats that led to the Law School's initial decision to suspend application of its antidiscrimination policy with respect to military recruiters. *See* App. 145-49. The military has recruited on campus pursuant to this suspension of the school's policy in most of the subsequent years.

dents on various grounds, including sexual orientation. These policies do not single out military recruiters for disfavored treatment: Military recruiters are subject to *exactly the same terms and conditions of access as every other employer*. When other recruiters have failed to abide by these tenets, they have been excluded.[4] When military recruiters have agreed to follow them, they have been welcomed.[5]

Accordingly, this case is not—and never has been—about whether law schools may "discriminate" against the military or whether they must provide "equal access" to military recruiters. Instead, the question is whether the Solomon Amendment confers upon military recruiters the unprecedented entitlement to disregard neutral and generally applicable recruiting rules whenever a school's failure to make a special exception might incidentally hinder or preclude military recruiting. The answer is "no."

The statute actually passed by Congress requires no such special exemption. Instead, it targets university policies that "prohibit[], or in effect prevent[]" military recruiters "*from gaining access*" to campuses and students "*in a manner* that is . . . equal in quality and scope" to that provided to any

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[4] During the 1990s, for example, Yale Law School's Career Development Office refused to assist a non-profit organization that had announced its intent to discriminate based on religion and sexual orientation. App. 77 (Eskridge Decl.). In 1981, NYU Law School's Office of Career Counseling and Placement declined to facilitate on-campus interviews by the FBI after being informed that the Bureau "would not hire homosexual Law School students or graduates." *Id.* at 152 (Law Decl.).

[5] Before 1997, recruiters from the United States Army signed Washington University School of Law's non-discrimination assurance and were "allowed to use the School of Law Career Services Office facilities." C.A. App. 102 (Appleton and Topaz Decl.). The same result occurred in 1982 when the United States Navy's Office of the General Counsel assured NYU Law School that all of its "hiring and advancement . . . [was] based on merit without regard to race, color, national origin, religion, age, sex, sexual orientation, handicap, political affiliation or marital status." App. 167; *see id.* at 153 (Law Decl.).

other employer. 10 U.S.C. § 983(b)(1) (emphases added). Nor are the government's current enforcement efforts consistent with the statutory background or legislative history, both of which make clear the Solomon Amendment's focus on policies that are specifically "anti-military." The Solomon Amendment's structure and the most closely related statutory provision also point in the same direction. In short, all recognized indicators of meaning suggest the same thing: The Solomon Amendment rules out policies that target military recruiters for disfavored treatment, but it does not touch evenhanded antidiscrimination rules that incidentally affect the military.

STATEMENT

As the District Court recognized, *see* Pet. App. 90a, and the government briefly acknowledges, *see* U.S. Br. 2, the history of the Solomon Amendment does not begin with the statute's enactment in 1994. Rather, the Solomon Amendment built on nearly three decades of legislation addressing the perceived effects of anti-military recruiting rules. Because this history provides important background for understanding the statute's current text, we describe it in some depth. Viewed as a whole, the legislative history suggests a single conclusion: that the Solomon Amendment is aimed at policies that single out the military, either by precluding military recruiting entirely or subjecting military recruiters to special unfavorable treatment.

The Solomon Amendment's Predecessors

The relevant history begins at a time when our Nation was deeply divided over the military's involvement in Southeast Asia. By the mid-1960s, many students had become troubled by "all connections between the university and the war." Report of the President's Commission on Campus Unrest 32 (Sept. 26, 1970) [hereinafter, "Commission Report"]. "[R]ecruiters . . . [came] to be regarded as symbols of the war" and "[d]emonstrations focus[ing] on representatives of

the armed services, the CIA and Dow Chemical Company" erupted at campuses across the country. Frederick W. Obear, *Student Activism in the Sixties*, *in* Protest! Student Activism in America 11, 20 (Julia Foster & Durward Long eds., 1970). On a number of occasions, protestors engaged in "[p]hysical obstruction of recruiters," *id.*, and other forms of "harass[ment]," Commission Report 32. Responding to these and other tumultuous events, a number of college and university faculties "passed resolutions to ban military recruiters." William R. Morgan, *Faculty Mediation in Campus Conflict*, *in* Foster & Long, *supra*, at 365, 377; *see also* 114 Cong. Rec. S6952 (daily ed. June 10, 1968) (Sen. Curtis) (discussing letter from Defense Department official listing 22 colleges and universities that had "tak[en] the position that certain of our recruiters cannot come on the campus").

Congress first responded to these "sentiment[s] in connection with the war" (*id.* at S6955 (Sen. Stennis)) during the summer of 1968. A Senate floor amendment to NASA's authorizing legislation for that year established a general rule against use of Agency funds at any "institution of higher learning" where "recruiting personnel of any of the Armed Forces of the United States [were] being barred from the premises or property of such institution." Pub. L. No. 90-373, § 1(h), 82 Stat. 281-82 (1968). The 1968 Act's prohibition, however, was not absolute; funds could continue to flow if NASA's Administrator determined that a particular grant was "a continuation or renewal of a previous grant . . . which [was] likely to make a significant contribution to the aeronautical and space activities of the United States." *Id.*

For the next four years, Congress stuck closely to the precedent it had established in 1968: declaring in defense-related agencies' annual funding statutes that specified dollars could not be used at colleges and universities that "barred" military recruiters but permitting exceptions to be

made for important ongoing work.[6] In 1972, however, Congress abandoned the practice of yearly funding riders and established permanent rules regarding use of Defense Department funds. "No . . . funds appropriated pursuant to this or any other Act for the Department of Defense," it declared, "may be used at any institution of higher learning if the Secretary of Defense . . . determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution." Pub. L. No. 92-436, § 606(a), 86 Stat. 740 (1972). Like each of its predecessors, however, the 1972 legislation authorized Executive Branch officials to overlook violations of the statute's requirements in certain specified circumstances.[7]

Given the Vietnam-era campus protests directed specifically at the military, it is unsurprising that the 1972 legislation trained its fire on policies that targeted military recruiters and banned them from campus entirely. The House Armed Services Committee explained:

> For several years students, faculties and administrations of some institutions of higher learning have indicated complete disaffection with any military activities on their campuses. As a result, military recruit-

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[6] For example, the language from the 1968 legislation reappeared in each NASA authorization bill between 1969 and 1972. *See* Pub. L. No. 91-119, § 1(h), 83 Stat. 197 (1969); Pub. L. No. 91-303, § 1(h), 84 Stat. 370 (1970); Pub. L. No. 92-68, § 1(h), 85 Stat. 175 (1971); Pub. L. No. 92-304, § 1(h), 86 Stat. 160 (1972). During 1970 and 1971, the authorizing bills for the Department of Defense contained provisions that were "identical in substance" to those in the NASA legislation. H.R. Rep. No. 91-1022, at 78 (1970); *see* Pub. L. No. 91-441, § 510, 84 Stat. 914 (1970); Pub. L. No. 92-156, § 502, 85 Stat. 427 (1971).

[7] *See* § 606(a) (if the Secretary of the relevant service certified a national security need); § 606(b) (if the Secretary of Defense determined that an expenditure was a continuation of an already-existing program with significant national defense benefits).

> ers have been barred from the campuses by the policy of some universities . . . .
>
> The Committee recognizes that each educational institution has the absolute right to determine whether it desires to have any association with the military forces of its country, and this includes the right to determine whether it desires to permit military recruiters . . . on its campus.
>
> On the other hand, Congress has the right and duty to determine how the appropriations made for the Department of Defense . . . should be spent. Whether the Government should spend monies at colleges and universities which, as a matter of policy, bar military recruiters . . . is a decision to be made by Congress. . . .
>
> If some institutions desire divorcement from the military, the separation should be made total and complete.

H.R. Rep. No. 92-1149, at 79-80 (1972).

The Original Solomon Amendment

The 1972 legislation was never repealed. Nonetheless, over time, it appears that "DOD . . . bec[a]me lax in enforcing [the 1972] statute." 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (Rep. Underwood). Responding to these enforcement concerns, Representative Gerald Solomon of New York offered a floor amendment to the Defense Department's authorizing legislation for fiscal year 1995. "No funds available to the Department of Defense," the proposal stated,

> may be provided . . . to any educational institution that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes—
>
> (A) entry to campuses or access to students on campuses; or
>
> (B) access to directory information pertaining to students.

Id. at H3861.

Representative Solomon made one thing clear: The Solomon Amendment was designed to "enforc[e] existing law." *See id.* at H3862 ("[T]here is existing law already. We are simply enforcing exiting law . . . ."). Without changing the nature of the underlying prohibition, the Solomon Amendment addressed enforcement concerns by eliminating the "waiver" mechanism that had until then permitted Executive Branch officials to continue funding in certain situations notwithstanding a school's failure to comply with the statutory requirements.

Subsequent Developments

Over the next decade, Congress on several occasions adjusted the consequences educational institutions would suffer if they failed to comply with the Solomon Amendment's mandate. None of these changes, however, altered the basic contours of the "existing law" that Representative Solomon had announced his intent to "enforc[e]." 140 Cong. Rec. H3862 (daily ed. May 23, 1994).[8]

In 2004, developments in this case prompted Congress to make a targeted change to the Solomon Amendment's substantive requirements. For many years, the Defense Depart-

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[8] In 1996, Congress extended both the Solomon Amendment and its sister "anti-ROTC" legislation to cover "funds made available in this or any other Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act." Pub. L. No. 104-208, § 514(a), 110 Stat. 3009-270; *see infra* pp. 15-16 (discussing the "anti-ROTC" provision). In 1999, it consolidated the original Solomon Amendment, the "anti-ROTC" statute, and their 1996 extensions, *see* Pub. L. No. 106-65, § 549(a), 113 Stat. 609-11, declared that violations by any "subelement" would require withholding designated funds from an entire "institution of higher education," § 549(a), 113 Stat. 609, and also made clear that neither prohibition applied to federal funds made "available solely for student financial assistance," Pub. L. No. 106-79, § 8120, 113 Stat. 1260. In 2002, Congress updated the statute to reflect the creation of the Department of Homeland Security. *See* Pub. L. No. 107-296, § 1704(b), 116 Stat. 2314.

ment and several universities had reached accommodations whereby law schools permitted military recruiters "to gain access to [their] campuses" but "reaffirm[ed] their opposition to the military's exclusionary employment policy by not providing them affirmative assistance in the manner provided to other recruiters." Pet. App. 7a. By 2003, however, the government had taken to asserting that the Solomon Amendment "requir[ed] universities to provide military recruiters access to students that is equal in quality and scope to that provided to other recruiters" (App. 129)—a position about whose validity the District Court expressed "grave reservations" in its opinion denying respondents' motion for a preliminary injunction. Pet. App. 180a; *see also* Brief of Professors William Alford *et al.* in Support of Appellants and in Support of Reversal at 17-22, *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (making the same point).[9]

In response to the District Court's opinion, the Administration asked Congress to modify the Solomon Amendment to ensure that military recruiters would have "the opportunity to compete for students on a footing equal with other prospective employers." H.R. Rep. No. 108-443 (Pt. I), at 7 (2004) (quoting letter from David S. C. Chu, Under Secretary of Defense, to the Hon. Duncan L. Hunter, Chairman, House Committee on Armed Services). Congress agreed, acting to "address the court's opinion and codify the equal access standard." *Id.* at 6. In its current form, the Solomon Amendment, in pertinent part, bars specified federal funds from flowing to any "institution of higher education" that

> has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

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[9] The argument noted above was the second of two made in *amici*'s Third Circuit brief. The first was the one made here: that Harvard Law School's antidiscrimination policy did not trigger the Solomon Amendment's funding prohibition in the first place. *See id.* at 9-17.

> (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.

10 U.S.C. § 983(b)(1).

SUMMARY OF ARGUMENT

The government's litigation strategy is clear: to portray the Solomon Amendment as just another antidiscrimination law, like the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. *See* U.S. Br. 19-20, 24-25. Again and again, it characterizes the Solomon Amendment as requiring only that "the federal government should have an equal opportunity to recruit the very students whose educations it has supported." U.S. Br. 11. In its opening brief, the government uses the phrase "equal access" *52 times*.

This soothing rhetoric, however, stands in sharp contrast to the government's aggressive implementation of the Solomon Amendment. As its actions towards Harvard, *see supra* note 3, and other law schools demonstrate, the government is demanding far more than equality of treatment; rather, it is insisting on being given a special exemption from even-handed antidiscrimination policies. In short, the government has chosen to enforce the Solomon Amendment as if it conferred upon the military a unique privilege—one shared by no other employer, including other agencies of the Federal Government—to disregard neutral and generally applicable rules designed to govern the conduct of all recruiters.

There is, however, a better way to read the statute—one that could resolve this case without requiring this Court to venture into the constitutional tangle presented in the parties' briefs. Consistent with the statute's text, its history, and the government's own rhetoric, the Court should hold that the statute confers no such unprecedented trump. Rather, like all

of its legislative predecessors, the Solomon Amendment applies only to policies that single out military recruiters for special disfavored treatment, not evenhanded policies that incidentally affect the military. Because there is nothing in the statutory text that would support a special rule for anti-discrimination policies, the only alternative would be to hold that the Solomon Amendment confers upon military employers the extraordinary right to claim immunity from *any* policy—no matter how evenhanded—that they deem burdensome to their recruiting efforts.

ARGUMENT

I. The Solomon Amendment Bars Only Anti-Military Policies; It Does Not Give Military Recruiters A Special Right To Disregard Neutral And Generally Applicable Recruiting Rules

This Court's "task is to construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). To do that, it "must examine the statute's text in light of context, structure, and related statutory provisions." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2620 (2005). Here, each of those indicators of meaning points to a single conclusion: that the Solomon Amendment's funding prohibition is triggered only by policies that bar military recruiting as such or single out military recruiters for special disfavored treatment.

As written, the Solomon Amendment's funding limitation is triggered if

> an institution of higher education . . . has a policy or practice . . . that either prohibits, or in effect prevents [military recruiters] . . . from gaining access to campuses, or access to students on campuses, . . . in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.

10 U.S.C. § 983(b)(1).

There is no allegation that any of the law schools in question restricts military recruiting as such, much less "prohibit[s]" military recruiters from gaining access on terms comparable to every other employer. Nor can there be any credible suggestion that the law schools crafted their antidiscrimination policies with the aim of excluding the military. There is nothing inherently suspicious about those policies, their adoption, or their application to suggest they may be pretexts for anti-military sentiment.[10]

Nor have law schools "in effect prevent[ed]" military recruiting. Congress took care to provide that it would not be a defense under the Solomon Amendment that an anti-military recruiting policy stopped short of an outright ban and instead required that such recruiting occur at times, in places, or under circumstances that made military recruiting difficult or impossible.[11] But there is no allegation of that here, and we are aware of no law school that has imposed upon military recruiters onerous requirements that are applicable to no others.

The only way a law school's evenhanded antidiscrimination policy could implicate the Solomon Amendment, therefore, would be if the statute required that military recruiters be given a preferential exemption from evenhanded and otherwise applicable recruiting rules. Nothing in the statutory text requires such special treatment. In addition, because the Solomon Amendment contains no reference to antidiscrimi-

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[10] *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("almost the only conduct subject to" an animal sacrifice ordinance was "the religious exercise of Santeria church members"); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (local act altered the shape of a city from a square to a 28-sided figure, which had the effect of removing all but four or five African-American voters without removing a single white voter).

[11] *Cf. Lane v. Wilson*, 307 U.S. 268, 270-71 (1939) (12-day window for voter registration applied only to persons who had not been permitted to vote under an earlier unconstitutional voting scheme).

nation policies, any such reading would necessarily require that military recruiters be deemed immune from *any* neutral and generally applicable recruiting rule that might incidentally inconvenience the military more than at least one other recruiter.[12] So far as we are aware, the government has never attempted to defend such an interpretation, and with good reason: it would be implausible in the extreme.

Seeking to ameliorate unhealthy competition, minimize disruption of the educational process, and affirm fundamental community values, educational institutions often place a variety of limitations on the conduct of employers during the recruiting process. For example, many law schools refuse to permit employers to "pre-screen" interviewees—on any basis—before on-campus interviews.[13] Others restrict the use of personal or otherwise confidential information that employers acquire during a particular recruiting season,[14] bar employers from communicating with students before December 1 during their first semester of study,[15] insist that offers of

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[12] *Cf. Exxon Mobil*, 125 S. Ct. at 2621 (stressing that "[t]he terms of [28 U.S.C.] § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction").

[13] *See, e.g.*, Office of Career Services, University of Chicago Law School, Information for Employers, *available at* http://www.law.uchicago.edu/careersvcs/information_employers.html ("It is the University of Chicago Law School's policy not to permit the prescreening of student resumes for the purpose of on-campus interviewing. You are obliged to interview students who were successfully scheduled during the computerized bidding process.").

[14] For example, Columbia Law School requires that "potential employers not use student e-mail addresses submitted on resumes for one recruitment program to globally solicit students' participation in another program in which they have not expressed an interest." Office of Career Services, Columbia Law School, Communication of Employment Opportunities, *available at* http://www.law.columbia.edu/careers/career_services/employers/Hiring_Informat/Employment_Oppo.

[15] *See, e.g.*, Office of Career Services, Duke Law School, Employer Interviewing Guide, *available at* http://www.law.duke.edu/career

employment be held open for specified periods,[16] or require prospective employers to pay fees designed to defer costs associated with the interviewing process.[17] And nearly every law school in the Nation declines to assist employers unless they certify that they will not distinguish among the school's students on various grounds—including sexual orientation—"that, in the law school['s] judgment, bear no relation to merit." App. 3.

In our view, none of those measures—including the anti-discrimination requirement—violates the Solomon Amendment, even though the military (like other employers) might find it more convenient not to comply, and even if the government's failure to do so forecloses recruiting at a given school. There is no indication that Congress intended to confer on the military a sweeping privilege—one enjoyed by no other employer, including other agencies of the federal government—to recruit whenever and however it wishes. And if the military fails to comply with the same evenhanded rules that govern everyone else, any resulting inability to interview is properly attributed to *the government's* "polic[ies] or practic[es]" rather than those of the educational institution in question.[18]

/employerinterview.html ("[F]all interviews with first-year students are not permitted.").

[16] *See, e.g.*, Office of Career Services, Harvard Law School, Recruiting Policies & Guidelines, *available at* http://www.law.harvard.edu/ocs/employers/Fall_OCI/Recruiting_Policies_and_Guidelines.htm.

[17] *See, e.g.*, Office of Career Services, University of Michigan School of Law, Recruiting at Michigan 2005-2006, p. 9, *available at* http://www.law.umich.edu/CurrentStudents/CareerServices/pdf/career.recruiting.2005.pdf.

[18] The fact that exclusion of lesbians, gays, and bisexuals from military service is currently mandated by Congress does nothing to change this analysis. *See* 10 U.S.C. § 654(b) & (c). Before § 654's enactment in 1993, such exclusions were based on military practice rather than congressional directive. *See* H.R. Rep. No. 103-200, at 286 (1993) (bill "would establish and *codify the Department of Defense policy* relating to

The 2004 amendments only strengthen the view that the Solomon Amendment is fundamentally an antidiscrimination measure. The first hint comes from the section heading in the enacting legislation: "Equal Treatment Of Military Recruiters With Other Recruiters." Pub. L. No. 108-375, § 552, 118 Stat. 1911 (2004). Consistent with this focus on parity, the amended statutory text neither requires law schools to facilitate military recruiting, nor mandates that they permit military recruiting in all instances. Rather, it tells law schools that they may not prevent military recruiters "from *gaining access*" to their facilities or students "*in a manner* that is at least equal in quality and scope" to that provided to any other employer. 10 U.S.C. § 983(b)(1) (emphases added). This phrasing confirms that the Solomon Amendment is simply not triggered if the terms and conditions under which the military is entitled to "gai[n] access" are *precisely the same* as those offered to all others.[19]

This reading of the statute is also supported by the historical context out of which the Solomon Amendment

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the appointment, enlistment, induction and separation of homosexuals in the Armed Forces . . . ." (emphasis added)); *id.* at 287 (bill "carrie[s] forward the fundamental tenets upon which the *DOD policy* regarding homosexuals has long been based" (emphasis added)). A change in the origination point within the government of a given policy cannot alter the analysis of whether the impacts of that policy are properly attributable to it or to a private party. If governmental policy precludes some of its own recruiters from complying with a school's evenhanded recruiting rules, any resulting inability to interview is properly attributable to the government—regardless of whether the policy originated with Congress, the Secretary of Defense, or a local military official.

[19] Nor does this reading deprive the 2004 amendments of significance. Rather, as both context and the legislative history suggest, *see supra* pp. 7-8, the new language was added to foreclose institutions' ability to single out military recruiters for disadvantageous treatment so long as they provided some minimal level of access. *See* Pet. App. 181a (District Court noting that the previous version of the Solomon Amendment "d[id] not provide" that "military recruiters are to be treated the same as other employers").

evolved. The predecessor acts that Representative Solomon announced his intent to "enforc[e]" (140 Cong. Rec. H3862 (daily ed. May 23, 1994)) were enacted in response to university policies that singled out the military *because it was the military* and they limited their application to schools that "barred" military recruiters as such. *See supra* pp. 3-6. Further underscoring the focus on specifically anti-military policies is the fact that the original Solomon Amendment--like all of its predecessors—applied only to defense-related funds. *See supra* pp. 4-7.

The Solomon Amendment's emphasis on specifically anti-military policies is further confirmed by a closely related statutory provision: 10 U.S.C. § 983(a), which addresses treatment of ROTC programs and their members. As originally enacted in 1996, this provision barred Defense Department funds from flowing "to any institution of higher education that . . . has an anti-ROTC policy." Pub. L. No. 104-106, § 541(a), 110 Stat. 315. In defining the critical words "anti-ROTC policy," that legislation used precisely the same language as that found in the Solomon Amendment: "a policy or practice . . . that . . . *prohibits, or in effect prevents*" either the Secretary of Defense from operating an ROTC unit at a given school or a student at one institution from enrolling in an ROTC unit at another. *Id.*, 110 Stat. 316 (emphasis added).[20]

Understanding § 983(a) as limited to "anti-ROTC" policies—and thus reading the Solomon Amendment as limited to "anti-military" policies—is necessary to avoid interpretative oddities. The statute mandates a funding cut-off if a school has "a policy or practice . . . that either prohibits, or in

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[20] The words "anti-ROTC policy" were removed from the statute during the 1999 recodification, *see* Pub. L. No. 106-65, § 549(a), 113 Stat. 609-11, but the current provision continues to refer to policies that "prohibit[], or in effect prevent[]" ROTC units or membership, 10 U.S.C. § 983(a). Tellingly, the Defense Department's implementing regulations continue to use the words "anti-ROTC policy," 32 C.F.R. § 216.4(b) (2005), and to define that phrase in terms of policies that "prohibit[], or in effect prevent[]" ROTC activities or participation, § 216.3(a).

effect prevents, . . . a student . . . from enrolling in a[n ROTC] unit . . . at another institution." 10 U.S.C. § 983(a)(2). A situation could easily arise where: (1) a college required all students with a given major to take a class that was offered only at one particular time; but (2) the only nearby ROTC unit had mandatory activities that conflicted with the course's meeting schedule. If the government's enforcement policies with respect to the Solomon Amendment reflected an accurate view of the meaning of "in effect prevents," then the school's requirement would presumably be one that "in effect prevent[ed] [the] student . . . from enrolling in a[n ROTC] unit . . . at another institution." And if that were true, institutions of higher learning could presumably be required to modify scores of neutral and generally applicable policies to ensure that their students' ability to participate in ROTC was not impaired. Like the Solomon Amendment, then, the ROTC provision is most sensibly read to rule out only policies that target ROTC programs and participants for special negative treatment.

Another provision points in the same direction. In 1996, Congress amended the Solomon Amendment to make clear that its limitations on funding should not be applied to any institution that "has a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2); *see* Pub. L. No. 104-208, § 514(c)(2), 110 Stat. 3009-271. Although such schools are unquestionably, in some sense, "anti-military," Congress apparently deemed it significant that they "are not *simply* antimilitary based on a political position of the time but rather have that deep-seated opinion." 142 Cong. Rec. H5716 (daily ed. May 30, 1996) (Rep. Goodlatte) (emphasis added). This further supports the view that the object of the Solomon Amendment's funding condition is policies that are "anti-military" as such. There is nothing remotely "anti-military," however, about insisting that military recruiters follow the same evenhanded rules as everyone else.

Finally, *amici*'s argument is perfectly consistent with the Solomon Amendment's legislative history. That history

makes clear Congress's concern that military recruiters not be singled out for special burdens. *See supra* pp. 3-9. But there are, so far as *amici* are aware, *no* statements by supporters of either the Solomon Amendment or its subsequent extensions declaring that the statute entitles the military to demand immunity from evenhanded recruiting rules. To the contrary, the debates are replete with statements that the statute requires no more than that the military be provided "the opportunity to recruit,"[21] "the same recruiting opportunities offered to private corporations,"[22] "access . . . that is equal to other employers,"[23] or "fair and equal treatment."[24] Although some opponents of the Solomon Amendment have opined that it was "designed among other things to punish institutions which refuse to permit recruiting by the Department of Defense because it discriminates against individuals on the basis of their sexual orientation,"[25] such claims warrant little weight. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation."); *see also NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 66 (1964) ("In their zeal to defeat a bill, [opponents] understandably tend to overstate its reach.").

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[21] 140 Cong. Rec. H3861 (daily ed. May 23, 1994) (Rep. Solomon).

[22] 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (Rep. Pombo).

[23] H.R. Rep. No. 108-443 (Pt. I), at 4 (2004).

[24] 150 Cong. Rec. H1711 (daily ed. Mar. 30, 2004) (Rep. Rogers).

[25] 140 Cong. Rec. S8278 (daily ed. July 1, 1994) (Sen. Moynihan); *see also, e.g.*, 150 Cong. Rec. H1695-96 (daily ed. Mar. 30, 2004) (Rep. McGovern); *id.* at H1705 (Rep. Frank); *id.* (Rep. Woolsey); *id.* at H1709 (Rep. Stark); *id.* at H1710 (Rep. Blumenauer); 140 Cong. Rec. H3864 (daily ed. May 23, 1994) (Rep. Schroeder); *id.* (Rep. Engel).

* * *

It is true that the Solomon Amendment was enacted by Congress not long after it first mandated exclusion of lesbians, gays, and bisexuals from military service. *See* Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1670 (1993). *But see supra* note 18. And it may well be that some members of Congress thought or hoped that either the Solomon Amendment or its recent amendments would require universities to condone the military's failure to comply with evenhanded antidiscrimination policies. But that is not the issue. The issue here is the proper meaning of the law Congress has *actually* enacted, not the uncodified and unstated desires of some of its drafters. If Members wish to enact a law exempting military recruiters from any policy that might somehow impair military recruiting—or to undertake the highly delicate and politically charged task of defining a sub-category of such policies from which the military should be deemed immune—they may do so, subject, of course, to constitutional constraints. But they have not done so. And this Court should not do it for them.[26]

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[26] There is no issue of *Chevron* deference in this case. The Department of Defense has never propounded an interpretive regulation that addresses the issue raised and to which a court could be asked to defer. Tellingly, the government has not seen fit to request deference of any kind at any stage of this litigation.

If anything, the position of the Executive Branch appears to support the statutory reading advanced by *amici*. The near-constant refrain of the government's brief—that the Solomon Amendment requires no more than "equal access"—is fully consistent with *amici*'s position but undercuts any assertion that the statute confers upon military recruiters a special privilege to disregard evenhanded antidiscrimination rules. In addition, Defense Department regulations support the view that the Solomon Amendment grants the military no freestanding exemption from neutral and generally applicable recruiting policies. Though not purporting to interpret the underlying statutory language, the regulations instruct that the funding prohibitions "shall not apply . . . if . . . the covered school . . . [w]hen not providing requested access to campuses or to students on

II. Sound Principles Of Judicial Restraint Counsel That This Court Should Resolve The Question Of Statutory Coverage Before Turning, Only If Necessary, To Constitutionality

The threshold statutory question discussed in this brief—whether evenhanded antidiscrimination policies even implicate the Solomon Amendment—should certainly be addressed before the Court takes up the complex constitutional issues implicated by the Court of Appeals' stated grounds of decision. As Justice Brandeis explained, a court should "not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of. . . . [I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide

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campus, certifies that *all employers are similarly excluded* from recruiting on the premises of the covered school, or presents evidence that the degree of access by military recruiters is at least *equal in quality and scope to that afforded to other employers*." 32 C.F.R. § 216.4(c)(3) (2005) (emphases added). If *all* employers who refuse to abide by an institution's antidiscrimination policy are "similarly excluded," then the "quality and scope" of access afforded to the military *is* the same as that "afforded to other employers."

Given all of these facts, the varied assertions made by an assortment of sub-cabinet officials in correspondence with law schools and their parent universities about what the Solomon Amendment requires should not be given any special weight in construing the statute. *See, e.g.*, App. 95-96, 99-100, 103-04, 107-08, 111-12, 116, 118-19, 123-24, 128-33, 187-88, 202-03. Absent an agency determination embedded in something other than the Defense Department's enforcement practices or the government's litigating position, there is nothing to which *Chevron* deference could be accorded. At most, the letters would be entitled to deference based on their persuasiveness pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See United States v. Mead*, 533 U.S. 218, 228 (2001). But as noted above, the government has never requested that sort of deference, and none would be warranted in any event because the letters generally make unadorned threats rather than attempt to articulate a coherent vision of the Solomon Amendment's proper meaning.

only the latter." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (concurring opinion).

This sound policy of avoiding "questions of a constitutional nature unless absolutely necessary to a decision of the case" (*id.* at 327) does not exist exclusively—or even principally—for the benefit of the particular parties before the Court. Accordingly, its application should not turn on their litigation strategies, and the fact that the parties have not addressed the threshold statutory question does not change the fact that this Court should do so. *See NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500, 507 (1979) (affirming a judgment on statutory grounds despite the fact that the party that had prevailed below made only constitutional arguments). *Cf. Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*) (remanding for reconsideration of statutory issues that "would moot the constitutional issues presented by the case" despite the fact that "[t]he parties have not briefed the statutory question").

Taking up the statutory question first would be especially prudent here because there is no way of deciding the Solomon Amendment's constitutionality, either way, without venturing into uncharted terrain. Even upholding the Amendment as properly construed could plunge the Court into contentious issues surrounding the spending power. Is there some limit on the use of conditional spending to exert pressure on private acts of conscience and communication? *Cf. Rust v. Sullivan*, 500 U.S. 173, 199 (1991) (noting that the Court has consistently rejected the position "that funding by the Government . . . is invariably sufficient to justify Government control over the content of expression"). Is there some point where "inducement" passes illicitly over into "coercion"? *See Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937); *South Dakota v. Dole*, 483 U.S. 203, 208 (1987). One need not take a position on these matters (and *amici* do not) to see that they are critically important and that this case presents no record conducive to addressing them cleanly.

Moreover, on the government's account—which would permit Congress to attach whatever conditions to federal funds it wishes so long as it does not seek to suppress particular viewpoints (*see* U.S. Br. 41)—its defense of the Solomon Amendment is still highly problematic. As noted earlier, the Solomon Amendment currently exempts from its funding prohibition educational institutions that have "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2). In light of this provision, the government is simply wrong in asserting that the Solomon Amendment "is entirely indifferent to an institution's reason for denying equal access." U.S. Br. 42. Rather, as currently enforced, the statute honors one sincerely held commitment (that religious pacifism is an adequate justification for excluding military recruiters), while failing to give equal regard to another (that students should be treated without regard to sexual orientation by the university community and by those—military or otherwise—whom it invites onto its campus). In other words, the Solomon Amendment not only exempts a single category of schools, it does so based on the specific *views* behind those institutions' wish to restrict military recruiting—something that should be more than enough to raise concerns about Congress's aim in enacting the statute.

On the other hand, if the Court of Appeals' stated justifications for concluding that the Solomon Amendment is likely unconstitutional were applied to the Amendment as we read it—an exercise not undertaken below—the consequences could be worrisome. *See* Pet. App. 11a-47a. Our concern, first and foremost, is in furthering the eradication of invidious discrimination. Accordingly, we are deeply concerned about an opinion that would accept the assertion that the Solomon Amendment requires nothing more than equal access—but *then* conclude that the statute is nonetheless unconstitutional because it infringes upon associational rights,

compels unwilling speech, or restricts expressive conduct.[27] Most obviously, such an approach could encourage attempts by discriminatory employers, educational institutions, or other groups to evade compliance with various pieces of federal civil rights legislation—including the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972—by asserting that granting equal treatment without regard to race or sex would send a "message" with which they disagree. *Cf.* U.S. Br. 19-20, 24-25.

An additional complication in our view is the possibility that affirmance of the Court of Appeals' reasoning would be invoked by discriminators in efforts seeking immunity from the large and growing number of laws and ordinances that outlaw unequal treatment on the basis of sexual orientation. By one recent count, 23 States, the District of Columbia, and at least 183 cities and counties now prohibit sexual-orientation discrimination in areas such as education, employment, housing, and public accommodations.[28]

At this point in our history, there are—happily—few institutions or groups willing to seek exemptions from civil rights laws on the ground that discrimination on the basis of race or sex is fundamental to their associational values. But the same cannot be said of those who seek to treat people unfavorably because they are lesbian, gay, bisexual, or transgender. And while this Court has recognized the compelling

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[27] If this Court were to accept the position of these *amici*, the propriety of proceeding to address the constitutional issue when the Court of Appeals had not done so on our understanding of the statute, and when sorting out issues of standing would pose its own difficulties, would seem doubtful. If, instead, the Court were to reject the position of these *amici* and thus could not avoid reaching the constitutional question, *amici* express no view of how the constitutional analysis should proceed, nor of the implications of a holding that such a requirement is unconstitutional.

[28] *See* Lambda Legal, Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation, *available at* http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=217.

nature of the government's interest in stamping out discrimination against racial minorities and women[29]—an interest that should outweigh even a constitutionally-based objection to enforcement of civil rights laws—it has not yet had the occasion to recognize a similarly compelling interest in the eradication of anti-gay bigotry.[30] As a result, civil rights laws banning sexual-orientation discrimination are those most likely to be challenged under the First Amendment theory endorsed by the court below and least likely to be upheld on the ground that they advance a compelling governmental interest.

There is no need for the Court to undertake this journey. There is another road the Court could take—one consistent with the best traditions of judicial restraint. As we have explained, the Court should hold that the Solomon Amendment is simply a measure that bars policies or rules that target the military for disfavored treatment. Were Congress ever actually to enact a law conferring upon military recruiters alone the unprecedented right to claim immunity from even neutral and generally applicable recruiting rules—like those adopted by Harvard Law School—there would be time enough to consider these sensitive and difficult constitutional issues.

CONCLUSION

For the reasons given above, this Court should affirm on alternative grounds.

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[29] *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (acknowledging the government's "fundamental, overriding interest in eradicating racial discrimination in education"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (noting society's "compelling interest in eradicating discrimination against its female citizens").

[30] This Court's opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), for example, contains no statement about the strength of the government's interest in eliminating discrimination based on sexual orientation.

Respectfully submitted.

WALTER DELLINGER
Counsel of Record
PAMELA HARRIS
TOBY HEYTENS
NICOLE SAHARSKY*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Illinois only*

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Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR *AMICUS CURIAE* THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF RESPONDENTS

DONNA R. EUBEN
ANN D. SPRINGER
DAVID M. RABBAN
ROBERT C. POST
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
1012 Fourteenth St., N.W.
Suite 500
Washington, DC 20005
(202) 737-5900

KATHLEEN M. SULLIVAN
Counsel of Record
VALERIE M. NANNERY
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
Suite 560
Redwood Shores, CA 94065
(650) 801-5000

Counsel for Amicus Curiae

September 21, 2005

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The American Association of University Professors (AAUP) respectfully submits this brief as *amicus curiae* in support of Respondents.[1] *Amicus* urges this Court to affirm the judgment of the Court of Appeals for the Third Circuit.

INTEREST OF *AMICUS CURIAE*

The AAUP is an organization of approximately 45,000 university faculty members and research scholars in every academic discipline, including law, dedicated to advancing the values of higher education. Founded in 1915, the AAUP is committed to the defense of academic freedom. The AAUP has participated as *amicus curiae* before this Court in numerous cases involving constitutional issues in higher education. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

One of the AAUP's principal tasks is the formulation of national standards for the protection of academic freedom. The AAUP's *1915 Declaration of Principles*, issued in the Association's founding year, is the nation's first and most sustained statement on academic freedom. AAUP, "General Report of the Committee on Academic Freedom and Tenure (1915)," AAUP POLICY DOCUMENTS & REPORTS 291 (9th ed., 2001) ("1915 Declaration"). The 1915 Declaration provides for "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action." *Id.* at 292.

The *1940 Statement of Principles on Academic Freedom and Tenure*, developed by the AAUP and the Association of

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[1] The parties have consented to the filing of this brief, pursuant to Rule 37, and their letters of consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *Amicus* states that no counsel for either party authored this brief in whole or in part, and no person or entity, other than *Amicus*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

American Colleges (now the Association of American Colleges and Universities), is the nation's most widely accepted description of the basic attributes of academic freedom and tenure. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS, *supra*, at 3 ("1940 Statement"). It has been endorsed by over 190 professional organizations and learned societies, and has been acknowledged by this Court. *See Bd. of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971).

The 1940 Statement recognizes the importance of academic freedom both to individual faculty members' research, scholarship and teaching, and to the collective faculty governance they engage in as "citizens, members of a learned profession, and officers of an educational institution." *1940 Statement*, *supra*, at 4. As the AAUP's statement *On the Relationship of Faculty Governance to Academic Freedom* notes, "sound governance practice and the exercise of academic freedom are closely connected, arguably inextricably linked," and "the faculty should have primary authority over decisions about such matters [as] . . . the maintenance of a suitable environment for learning. . . ." AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, AAUP POLICY DOCUMENTS, *supra*, at 224, 225 & 227 ("Faculty Governance").

Another of the AAUP's core commitments, expressed in its 1976 policy statement *On Discrimination*, is to protect against discrimination within universities on any "basis not demonstrably related to the job function involved," including discrimination on the basis of sexual orientation. AAUP, *On Discrimination* (1976), AAUP POLICY DOCUMENTS, *supra*, at 185 ("On Discrimination").

This case implicates the AAUP's interest in defending the academic freedom of university faculties and faculty members to be free from inappropriate government interference in

their teaching, research, and collective educational policy-making. It also implicates the AAUP's interest in opposing unjustified discrimination in the university setting on grounds, like sexual orientation, that are unrelated to academic merit. The AAUP offers this brief *amicus curiae* to explain why the First Amendment interests that Respondents defend here are of special importance to university faculties and faculty members, and how the Solomon Amendment intrudes upon vital freedoms of faculty expression and university self-governance.

SUMMARY OF ARGUMENT

The issue in this case is whether the First Amendment permits the federal government to condition the entire flow of federal funding to universities for teaching and research on the requirement that every "subelement" within the university give recruiters from the United States military the same access to its career placement program as it gives to other employers. Many law schools have sought to exclude military employers from those programs because the United States military discriminates against student recruits on the basis of sexual orientation, and the schools' faculties have adopted academic nondiscrimination policies that deem students' sexual orientation irrelevant to their merit or fitness for postgraduate employment. Congress enacted the challenged Solomon Amendment in order to "send a message over the wall of the ivory tower of higher education" to "colleges and universities . . . that their starry-eyed idealism comes with a price." 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (Rep. Pombo).

By prohibiting all federal funding to an entire university if any of its subelements enforces a nondiscrimination policy against military recruiters, the Solomon Amendment directly interferes with academic freedom long protected by the First Amendment. Academic freedom extends beyond teaching and research narrowly understood. It also includes faculty

policies setting the criteria under which universities admit and evaluate students, and the standards and methods that faculties bring to bear to shape the educational environment outside the classroom, including by modeling and instilling professional values that students will carry into postgraduate employment. Law school faculties' adoption and enforcement of nondiscrimination policies represent the exercise of academic self-governance and expertise. *See* Part I.

The government argues that the Solomon Amendment does not aim at speech but rather at the instrumental goal of securing the military's access to college and university students in order to staff the armed forces. *See* Pet. Br. at 15–16, 42. The government claims also that the Solomon Amendment is merely a permissible exercise of Congress's discretion under the Spending Clause, and that universities are always free to give up the nearly $35 billion they now receive annually in federal funding. *See* Pet. Br. at 41 ("[T]he recourse for a person who does not wish to be bound by a funding condition is to decline federal assistance."). Both claims are incorrect.

The Solomon Amendment, as currently amended and applied, does not aim at the functional goal of recruiting students but rather has the impermissible purpose of suppressing faculties' message that discrimination against gay students in recruiting violates academic merit and nondiscrimination standards. This purpose is what animated the law's amendment to require "*equal* access" for military employers, rather than simply the "access" the law required when first enacted.

As initially applied, the Solomon Amendment permitted law schools that excluded military recruiters from their *official* career placement programs to have military recruiters meet with students by other means, so long as these means were adequate to ensure access. The record contains no evidence that the function of military recruiting suffered under the alternative arrangements offered by law schools.

But in 2001, the military changed its interpretation of the Solomon Amendment and adopted an informal policy requiring *equal* access. In 2004, Congress codified that change, so that now the military must have access "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer. . . ." 10 U.S.C. § 983(b) (2005).

The sole purpose of the military's equal-access requirement was to prevent law schools from using alternative recruiting arrangements to convey their view that the military's discrimination is improper. As one military recruiter revealingly summarized, "singling out military recruiters" for any different access, no matter how effective, "sends the *message* that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations" included in career services programs. JA 132 (emphasis added). Interfering with faculties' message in order to send a different message is quintessential viewpoint discrimination in violation of the First Amendment. *See* Part II.

The government is likewise incorrect that the Solomon Amendment merely earmarks federal funds for particular purposes. To the contrary, as currently applied, it penalizes the entire university if any "subelement" deviates from the government's demands—without regard to whether the subelement itself receives federal funding. The government thus uses funding leverage to coerce universities to abandon protected speech in areas wholly *un*related to its exercise of its spending power.

This feature of the Solomon Amendment ignores the well-settled law of unconstitutional conditions. Under this Court's precedents, a funding condition violates the First Amendment when aimed at expression wholly unrelated to the purposes for which funding is given. Government may not place a speech-restrictive "condition on the *recipient* of a subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected

conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original). That, of course, is precisely what the Solomon Amendment does.

Like the "equal-access" provision, this "subelement" rule is the product of changes to the original Solomon Amendment to make its consequences for universities ever more draconian. As originally applied, the Solomon Amendment limited any loss of funding to Defense Department funds, and to the particular "subelement" of the university found not in compliance. Thus, if a law school denied access to military recruiters, then only the law school, not the entire university, would lose funding. The Solomon Amendment has since been extended to cover funds from the Departments of Labor, Health and Human Services, Education and Homeland Security, and to provide that a violation by any part of the university triggers a loss of federal funding for the university as a whole.

Like the "equal-access" provision, the "subelement" rule's indiscriminate reach into every laboratory, library and lecture hall across campus is unnecessary to serve the government's purposes. The government provides no funds for career services activities, and military recruiting at law schools is unrelated to the reasons the National Institutes of Health provide scientists funding for infectious disease research or the Education Department provides teachers in training subsidies for bilingual education. Law schools that receive no federal money are organizationally and financially separable from other subelements of the university that do. Thus the Solomon Amendment unnecessarily exceeds the legitimate scope of the government's spending discretion to earmark funds for particular purposes. By pitting subelements within the university against each other, it also intrudes into university self-governance protected by academic freedom. The sweeping scope of the Solomon Amendment's sube-

lement rule is an independent ground for its invalidation under the First Amendment. *See* Part III.

These arguments do not raise constitutional doubt about the conditions imposed by Title VI and Title IX of the Civil Rights Act, which require universities that receive federal funds to forego race or sex discrimination throughout all their educational programs. The conditions attached to federal funding by the Solomon Amendment are imposed for the purpose of suppressing the expression and academic freedom of university faculties, but this is not true of Titles VI and IX. The conditions imposed by the Solomon Amendment are unrelated to the subject matter of the federal research funding that they place in jeopardy, but the conditions that Titles VI and IX impose, eliminating support for race or sex discrimination, bear a substantial logical nexus to each and every educational program throughout the university. Finally, the history of the Solomon Amendment shows that the military was able to recruit law students to its ranks without such drastic requirements as "equal access," but the long history of the government's efforts to eradicate discrimination based on race and sex shows that extraordinary prophylactic measures continue to serve a compelling need.

The Solomon Amendment thus violates freedom of speech and core principles of academic freedom protected by the First Amendment. The Third Circuit's judgment should be affirmed.

ARGUMENT

At issue in this case is the constitutionality of the Solomon Amendment, a federal statute providing that federal funds may not "be provided to an institution of higher education (including any subelement of such institution)" if that institution "has a policy or practice" that prevents military employers "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting." 10 U.S.C. § 983(b) (2005). This law violates the First

Amendment and, in particular, the academic freedom this Court has long respected as a key aspect of freedom of speech.

As detailed below in Part I, the Solomon Amendment violates well-settled principles of academic freedom by displacing faculty judgment in core areas of academic expertise. Part II shows how the Solomon Amendment, as applied to require equal rather than adequate access for military recruiters, has the impermissible purpose of suppressing faculties' viewpoint. Part III shows how the Solomon Amendment, as applied to withdraw funds from the entire university for the speech of a single school—even if that school receives no federal funds—amounts to an unconstitutional penalty rather than a permissible exercise of the spending power. For these reasons, the Solomon Amendment as currently applied violates the First Amendment.

I. THE SOLOMON AMENDMENT INTERFERES WITH ACADEMIC FREEDOM BY DISPLACING FACULTY JUDGMENT IN CORE AREAS OF ACADEMIC POLICY AND EXPERTISE.

If the federal government had required as a condition of federal funding that university faculties allow army officers to accompany professors to the lectern in order to provide the government's perspective to students in class, there would be no doubt that the condition raised serious questions of academic freedom. Academic freedom likewise would be obviously implicated if the government had required a military co-author to be included in every published book or article resulting from scholars' university research.

The fact that this case involves the forced inclusion of military recruiters in universities' programs to place students in postgraduate employment does not diminish these First Amendment concerns. Academic freedom extends to faculty decision-making beyond teaching and research construed narrowly.

Academic freedom extends also to admissions, extracurricular activities, evaluation criteria, and the academic values that universities seek to impart to their students throughout the educational environment. The Solomon Amendment improperly displaces academic freedom in this larger sense.

A. Academic Freedom Extends to Faculty Policies Prohibiting Discrimination Against Students in Postgraduate Employment.

The Solomon Amendment interferes with decisions by the nation's law schools, beginning in the late 1970s, to extend their existing nondiscrimination policies to include the criterion of sexual orientation. JA 69-71, 150-152. These policies were adopted through faculty meetings, debates and official votes, all core aspects of academic self-governance. JA 69-71, 150-152. These policies now ban discrimination on the basis of race, national origin, gender, religion, age, disability, veteran status—and sexual orientation. JA 18, 32-34, 56, 71, 136, 151, 179, 211. As one aspect of these policies, law schools offer their official career services programs only to employers that ban discrimination on these grounds. Such policies reflect the academic judgment of law school faculties that nondiscrimination is an essential professional value that should be taken seriously in the future career choices of their students. It also reflects their academic judgment that employment, like grades on exams or essays, should be distributed on the basis of individual effort and merit rather than on any "basis not demonstrably related to the job function involved." AAUP, *On Discrimination*, *supra*, at 185.

This Court has long acknowledged that academic freedom is a "special concern of the First Amendment," even if it is "not a specifically enumerated constitutional right." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring). "[U]niversities occupy a special niche in our constitutional tradition," *Grutter v. Bollinger*,

539 U.S. 306, 329 (2003), and "a traditional sphere of free expression," *Rust v. Sullivan*, 500 U.S. 173, 200 (1991), that is worthy of profound respect. "[I]n the University setting, . . . the [government] acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

Academic freedom is not just a right of professors; it has a "transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents of the Univ. of New York*, 385 U.S. 589, 603 (1967). The "essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In short, academic freedom is "fundamental to the functioning of our society." *Rust*, 500 U.S. at 200.

The application of these principles to this case would be obvious if the Solomon Amendment had directly targeted university teaching or scholarship. Academic freedom "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Sweezy*, 354 U.S. at 250; *see also Epperson v. Arkansas*, 393 U.S. 97, 104–05 (1968). As Justice Powell wrote in *Bakke*, relying on Justice Frankfurter's famous concurrence in *Sweezy*: "It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Bakke*, 438 U.S. at 312 (Powell, J., concurring) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

Academic freedom has long been deemed to extend beyond teaching and research. It is settled that it extends to university admissions. *See Sweezy*, 354 U.S. at 262–63 (Frank-

furter, J., concurring) (including among the four freedoms of the university the freedom "'to determine for itself on academic grounds . . . who may be admitted to study'") (quoting *The Open Universities in South Africa* 10-12)); *Grutter*, 539 U.S. at 328–29 (deferring to the University of Michigan Law School faculty's "educational judgment that [racial] diversity [in admissions] is essential to its educational mission").

Academic freedom also extends to faculty coordination of extracurricular student activities. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231-32 (2000) (declining to distinguish extracurricular student activities along lines of relevance to the university's mission of "stimulat[ing] the whole universe of speech and ideas": "It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.").

Academic freedom likewise extends to university governance on matters of educational policy, structure and environment. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n.12 (1985) (stating that academic freedom "thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself" (quoting *Keyishian*, 385 U.S. at 603)); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) (acknowledging "the importance of avoiding second-guessing of legitimate academic judgments" and reiterating that "'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment'" (citation omitted)).[2]

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[2] *See also* 1966 *Statement on Government of Colleges and Universities*, AAUP POLICY DOCUMENTS, *supra*, at 221 (providing that faculty have "primary responsibility" for educational policy decisions, including "those aspects of student life which relate to the educational process"); AAUP, *Faculty Governance*, *supra*, at 224, 225 & 227.

It follows that academic freedom also protects faculty policies that set forth criteria for advancing students into postgraduate employment and seek to instill educational values that students will carry with them into that employment. Preparing students for future employment is, after all, the ultimate function of the university in our society. This Court's opinion in *Grutter* went so far as to emphasize the career placement aspect of higher education as a ground for upholding racial diversity in admissions: "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 331–32.

No less than curricular, extracurricular or admissions policies, nondiscrimination policies also reflect the exercise of faculties' academic expertise. Academic freedom plainly includes the tasks of evaluating and rewarding student performance. In *Ewing*, the Court held that "'[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.'" 474 U.S. at 225 n.11 (quoting *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring)). Just as a faculty may determine as a matter of educational policy to award grades based on students' merit, so it may determine that merit shall be the touchstone of a school's career development program. A faculty is entitled to make the academic judgment that assisting recruitment by an employer that refuses to hire openly gay students is akin to failing a student in class merely for being gay.

This connection between academic expertise and nondiscrimination policy is especially strong in law schools, where legal education turns as much on modeling professional values as it does on formal classroom training. As this Court

has stated: "[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950); *see Grutter*, 539 U.S. at 332 (noting that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders" (citing *Sweatt*)). "'[T]he law and lawyers are what the law schools make them.'" Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 34 n.1 (1992) (quoting a May 13, 1927 letter from then-Professor Felix Frankfurter). Career planning and placement services thus are part of law schools' "hidden curriculum," which may well affect law students' professional attitudes more than the "formal curriculum" ever does. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. Legal Educ. 247, 253 (1978).

Nondiscrimination policies in employment also attempt to instill the standards of professional conduct that law school graduates must follow upon entering the legal profession. The rules adopted by the highest courts of many states provide that it is professional misconduct for a lawyer to discriminate in employment on the basis of sexual orientation.[3] The codes of judicial conduct of more than thirty states prohibit judges from manifesting bias or prejudice based on sexual orientation.[4]

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[3] *See, e.g.*, Cal. R. Prof'l Conduct 2-400 (B); D.C. R. Prof'l Conduct 9.1; Ill. R. Prof'l Conduct 8.4(a)(9)(A); 22 N.Y. Comp. Codes R. & Regs. § 1200.3 (a)(6)(DR 1-102); Ohio Code Prof'l Responsibility DR 1-102(B); Vt. R. Prof'l Conduct 8.4(g); Wash. R. Prof'l Conduct 8.4(g).

[4] *See, e.g.*, Fla. Code of Jud. Conduct, Canon 3B(5)-(6); Idaho Code of Jud. Conduct, Canon 2(C); Ill. Code of Jud. Conduct, Canon 3(A)(8); Kan. Code of Jud. Conduct, Canon 3(B)(5); Minn. Code of Jud. Conduct,

For all these reasons, the Solomon Amendment interferes with core aspects of academic freedom—namely, faculties' ability to determine the professional standards and values that they will impart to their students and to utilize the most effective mechanisms for doing so.

B. The Solomon Amendment Interferes with the Academic Freedom of Faculties to Set Policy and Exercise Self-Governance.

Two features of the Solomon Amendment make manifest its interference with these core aspects of academic freedom. As originally applied, the Solomon Amendment merely forbade each unit of the university to exclude military recruiters from that unit as a condition of that unit's receipt of Defense Department funds. Thus, law schools were free to enforce their nondiscrimination policies by excluding military recruiters from their *official* career placement programs while allowing military recruiters to meet with students by other means, and many schools readily did so. *See* JA 59–60, 154–156, 180–181.

By 2001, however, the Defense Department had made the funding strictures on universities more draconian in two respects. First, it adopted a policy of *equal* access to campuses and students for military recruitment, rather than simply adequate access. In 2004, this new administrative requirement was codified by Congress, so that the Solomon Amendment now requires that the military have access "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer. . . ." 10 U.S.C. § 983(b) (2005).

This reformulation intrudes directly into faculty policy-making. It threatens funding withdrawal even if a law school

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Canon 3(A)(5); Miss. Code of Jud. Conduct, Canon 3(B)(4); Tex. Code of Jud. Conduct, Canon 3(B)(6); Utah Code of Jud. Conduct, Canon 3(B)(5); W. Va. Code of Jud. Conduct, Canon 3(B)(5).

does allow military recruiters access to its campus and students—for example, by furnishing the military with student names and transcripts and inviting military representatives to meet with students in classrooms or nearby facilities—if the government deems that access insufficiently similar to the access given other employers who do not discriminate. There is no showing in the record, however, that such alternative arrangements led military recruitment efforts to suffer before the government's 2001 change in its university access policy.

Second, from 2001 forward, the government vastly extended the scope of the Solomon Amendment to academic programs throughout the university. It applied conditions not only to Defense Department funds but also to all university funds from the Departments of Labor, Health and Human Services, Education and the departments later merged into the Department of Homeland Security, 10 U.S.C. § 983(d)(1). The government also began to interpret the Solomon Amendment to provide that a violation by any part of the university would trigger a loss of federal funding for the university as a whole. A single unit's nonconformity with the condition now jeopardizes federally funded research campuswide.

The effect of this "subelement" rule has been coercive: universities have uniformly sacrificed their law schools' nondiscrimination policies in order to retain vast sums for scientific and other research in other schools and departments. The subelement rule also compounds the violation to law schools' academic freedom; it intrudes upon the university's academic freedom to determine how its schools and departments relate to one another as a matter of internal governance.

II. BY REQUIRING "EQUAL" RATHER THAN ADEQUATE ACCESS FOR MILITARY RECRUITMENT, THE SOLOMON AMENDMENT IMPROPERLY AIMS AT SUPPRESSING ACADEMIC EXPRESSION BASED ON ITS MESSAGE.

Because faculty policies declaring sexual orientation irrelevant to academic merit constitute expression at the core of academic freedom, the government may not target that expression "because of its message [or] its ideas" without the most compelling justification. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). A content-based regulation aimed at viewpoint is presumptively invalid. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); *Texas v. Johnson*, 491 U.S. 397, 416 (1989). For the following reasons, the Solomon Amendment as currently interpreted and applied should be found to constitute impermissible viewpoint discrimination.

A. The Equal-Access Requirement Serves No Purpose Other Than Viewpoint Discrimination.

The legislative history of the Solomon Amendment provides ample evidence that it was originally enacted with the purpose of punishing faculties who declined to enforce the military's discriminatory policies within their campus placement programs. For example, Representative Richard Pombo urged Congress to support the Solomon Amendment to "send a *message* over the wall of the ivory tower of higher education" by conveying to "colleges and universities . . . that their starry-eyed idealism comes with a price." 140 Cong. Rec. H3863 (emphasis added).

Such singling out of speakers for their viewpoint is the most "blatant" form of free speech violation. *Rosenberger v. Rector & Visitors*, 515 U.S. at 828. Retaliatory legislative motivation alone is sufficient to discredit a law as impermissibly viewpoint-based. *See, e.g., Minneapolis Star &*

Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 579–80 (1983) (describing this Court's decision in *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936), which invalidated a tax singling out newspapers that had "'ganged up' on Senator Huey Long," as "attributable in part to the perception on the part of the Court that the state imposed the tax with an intent to penalize a selected group of newspapers").

But even if the censorial *motive* of legislators who enacted the Solomon Amendment were ignored, *cf. United States v. O'Brien*, 391 U.S. 367, 384 (1968), the current *text and structure* of the Solomon Amendment make clear that it is aimed at faculty viewpoint. The government claims that the law aims simply at the instrumental, non-expressive goal of gaining access to campuses to recruit students to military service. But the switch from an access requirement to an *equal*-access requirement belies that claim.

Before 2001, military recruiters were able to reach potential student candidates for military service through a variety of means other than access "equal in quality and scope" to that provided to employers who do not discriminate. There is no evidence that such alternative access was ineffective. Indeed, the military even expressed gratitude to those schools that made efforts to accommodate military recruiters' access to students by means other than their official career service programs. *See* JA 60, 169-170.

The demand for *equal* access thus serves no functional purpose. It cannot be justified by the content-neutral goal of facilitating military recruitment, but amounts to a simple insistence on symbolism. As military recruiters candidly revealed, differential access, no matter how effective, in their view "sends the *message* that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organization[s]" included in official career services programs. JA 132 (emphasis added). This suggests that the military enforces the equal-access

policy not to recruit soldiers but to supplant law school faculties' message with a message of the government's own.

To suppress "the specific motivating ideology or the opinion or perspective" of law school faculties in this way is quintessential viewpoint discrimination. *Rosenberger*, 515 U.S. at 829 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). The government may not interfere with faculties' academic policy based on its dislike of anticipated listener reaction to the message. *Cf. Johnson*, 491 U.S. at 410 (invalidating as impermissibly viewpoint-based a flag desecration statute defended on the basis of the government's concern that "such conduct will lead people to believe . . . that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts"); *see Boos v. Barry*, 485 U.S. 312 (1988) (invalidating a statute prohibiting the display of signs outside a foreign embassy so as to bring the foreign government into "public odium" or "public disrepute"); *Schacht v. United States*, 398 U.S. 58 (1970) (invalidating a federal statute forbidding the portrayal of armed forces uniforms in a manner tending to discredit the armed forces).

The analysis is no different if the military is understood to compel faculty speech rather than to forbid it. Viewed this way, the Solomon Amendment conscripts law school faculties into uttering a message contrary to their own academic nondiscrimination policies: namely, that military employment *is* honorable and desirable, even though military employers discriminate on the basis of sexual orientation. Such government compulsion to disseminate a message a faculty believes should not be disseminated "exacts a penalty on the basis of . . . content." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). The injury is compounded by the government's insistence on occupying particular physical space at law

schools rather than the alternative space offered in nearby locations. *Cf. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986) (sustaining a compelled speech challenge to a requirement that a utility devote space in its billing envelopes to the counterspeech of environmental groups).

Nor is the analysis any different if the Solomon Amendment is understood as compelling unwanted association rather than unwelcome speech. Faculties engage in expressive activity when they convene in an "association that seeks to transmit . . . a system of values," *Boy Scouts of America v. Dale*, 530 U.S. 640, 649-50 (2000), and the government may not force them to include military recruiters in that association if that would impair their ability to transmit those values. The forced participation of military recruiters in officially sponsored career programs impairs faculties' expression by "send[ing] a message" that law schools accept discrimination against gay students "as a legitimate form of behavior." *Id.* at 653.

Hence the government's analogy to the free association claim rejected in *Grove City College v. Bell*, 465 U.S. 555 (1984), is misplaced. *See* Pet. Br. 24-25. In *Grove City*, the government sought to advance a generally applicable interest in combating discrimination against women. Here, by contrast, the government's stated interest is in suppressing the message adopted by faculties in their exercise of academic freedom. No "ideology or philosophy" requiring the subordination of women was seriously advanced as a ground for objection to the government's funding conditions in *Grove City*. The ground for requiring association there was content-neutral. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984) (upholding the application of a state antidiscrimination law to an all-male social club where the Jaycees lacked "ideologies or philosophies" requiring the exclusion of women). The government here, by contrast, aims at the *expressive* aspect of association between law school faculties and military recruiters—*i.e.*, the message that equal

or differential access sends to observers. In any event, it has long been settled in national debate that sexism, like racism, is not an expressive ground for disassociation that government is required to respect. *See, e.g., id.* at 628; *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

Nor are career services programs akin to a "public forum" in which military recruiters do not implicate the law school's own academic values, as the government and its *amici* incorrectly assert, *see* Pet. Br. 27, 31–32; *Amicus Curiae* Brief of the Judge Advocates Ass'n in Support of Petitioner, at 21; Brief of Boy Scouts of America as *Amicus Curiae* in Support of Petitioners, at 2 & 13–18. Such programs are not open fairs for any speaker on a first-come-first-served basis, but instead involve official sponsorship of speech that is carefully selected and monitored by a law school faculty and staff. *Cf. Perry Educ. Ass'n*, 460 U.S. at 44, 47 (declining to find teachers' mailboxes a public forum). Thus, "whether or not they occur in a traditional classroom setting," career services programs are akin to curricular activities where educators may impose limitations "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988) (high school student newspaper). In such a setting, the likelihood of misattribution of employers' discriminatory messages to the law school itself is considerable. *See* JA 163–164.

B. Viewpoint Discrimination is Impermissible in Conditions on Funding.

Even "in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" *NEA v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983)). Thus "'ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts.'" *Rosenberger*, 515 U.S at 830 (citation omitted). This principle has been established for at

least half a century, *see Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating a law giving tax exemptions only to those veterans who swore a loyalty oath), as the government concedes, *see* Pet. Br. at 41.

In recent illustrations of this principle, the Supreme Court has struck down funding restrictions that, like the Solomon Amendment, discriminated on the basis of viewpoint. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), this Court invalidated a denial of federal funds to any organization representing indigent clients in "an effort to amend or otherwise challenge" the existing state or federal welfare system, *see id.* at 537, holding that Congress may not "define the scope of the litigation it funds to exclude certain vital theories and ideas," *id.* at 548. Similarly, in *Rosenberger*, this Court struck down a denial of state university funds to a student-run newspaper espousing a Christian evangelical perspective, holding that the government may not select "for disfavored treatment those student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831.

The conditions that the government seeks to place upon federal funding in this case are similarly invalid. Here, as in *Velazquez*, Congress may not use the withdrawal of funds as leverage to suppress faculties' viewpoint. And here, as in *Velazquez* and *Rosenberger*, the government may not control "an existing medium of expression" such as a career placement program "in ways which distort [that program's] usual functioning." *Velazquez*, 531 U.S. at 543.

III. BY WITHDRAWING FEDERAL FUNDING FROM AN ENTIRE UNIVERSITY, THE SOLOMON AMENDMENT UNCONSTITUTIONALLY PENALIZES PROTECTED SPEECH.

The government asserts that the impermissibility of viewpoint discrimination is the *only* First Amendment limit on the power of Congress to impose spending conditions, and that, "[o]therwise, the recourse for a person who does not wish to

be bound by a funding condition is to decline federal assistance." Pet. Br. at 41. This remarkable statement is incorrect. At one time, some Justices might have given the government such a free hand in allocating its own largesse. *See, e.g., McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman."). But this Court's modern precedents have long abandoned such an approach. Today, while the government may decline to subsidize speech with which it disagrees, it may not use the leverage of funding to pressure recipients to surrender speech lying wholly outside the contours of the funded program.

The Solomon Amendment as currently interpreted does just that, penalizing speech wholly nongermane to the subject matter of government subsidies to universities. It threatens to withdraw a breathtaking range of federal funds from university research and teaching that has no relation whatsoever to law school policies on military recruitment. Moreover, it allows universities no option to treat their law schools, which receive no federal funding, separately from other units of the university that do receive federal funding. For these reasons, the Solomon Amendment violates the First Amendment even if it is held not to discriminate based on viewpoint.

A. The Solomon Amendment Aims At Speech Unrelated to the Subject Matter of Federally Funded Programs.

Federal funding has been vital to the excellence of the research and teaching carried out at the nation's universities. But the Solomon Amendment imposes conditions on speech that has no nexus or relationship to the purpose of that federal funding.

1. *Federal Funding is Vital to the Nation's Universities.*

Post-secondary institutions depend heavily on federal funding to support their annual expenditures. In Fiscal Year ("FY") 2003, for example, such institutions received an estimated $57.5 billion in federal funds, which accounted for 19.2 *per cent* of their expenditures. William C. Sonnenberg, *Federal Support for Education FY 1980 to FY 2003* (NCES 2004–026), U.S. Dep't of Education: National Center for Education Statistics, at 15, 21 (2004), *available at* http://nces.ed.gov/pubs2004/2004026.pdf (last visited Sept. 17, 2005). In FY 2003, post-secondary education institutions received the largest share of federal support for education. *See id.* at 15. Post-secondary institutions received *all* of the $29.2 billion in federal research funding to education institutions in 2003, *id.* at 10, 15, and over $5 billion in grants for purposes other than research, *id.* at 35-36. Thus, even though federal funding for nearly $23 billion in annual student financial aid is exempt from the Solomon Amendment, *see* 10 U.SC. § 983(d)(2), nearly $35 billion in annual federal support for higher education remains at stake.

Most federal support for research at post-secondary institutions comes from the Department of Health & Human Services, including the National Institutes of Health. *See* Sonnenberg, *Federal Support* at 9. In FY 2003 alone, HHS expended $15.8 billion, or 54 *per cent* of all federal educational support for research. *Id.* Almost all of the research grants provided by the NIH over the past 12 years have gone to post-secondary institutions. *See NIH Support By Kind of Institution, FY 1993-2003: Research Grants, available at* http://grants.nih.gov/grants/award/trends/instchar03rg.htm (last visited Sept. 17, 2005).

2. *The Solomon Amendment Affects a Vast Range of Academic Research Unrelated to Defense or Military Recruiting Purposes.*

The federal funds affected by the Solomon Amendment support university teaching and research in a vast range of subject areas, *see* 10 U.S.C. § 983(d); 32 C.F.R. § 216.2 (listing funding from the Departments of Labor, Health & Human Services, Education, Homeland Security, and "Related Agencies," such as the Corporation for National and Community Service, the Corporation for Public Broadcasting, and the National Commission on Libraries and Information Science), but none of these subject areas relates to military recruiting. *See generally Catalog of Federal Domestic Assistance*, *available at* http://12.46.245.173/cfda/cfda.html (last visited Sept. 18, 2005) (listing all federal assistance programs available to institutions). In fact, only a small percentage of federal funding provided to universities is related to any military purpose at all. *See* Sonnenberg, *Federal Support*, at 35–36, 38. In FY 2003, the Department of Defense provided only $2.2 billion, or 7 *per cent*, of all federal research support to post-secondary institutions. *Id.* at 9.

Most funds covered by the Solomon Amendment are provided to support research and development, including vital medical research on infectious diseases, neuroscience and neurological disorders, heart and vascular diseases, mental health, aging, diabetes and endocrinology, immunology, lung diseases, the human genome, HIV/AIDS, and the causes, prevention, detection, diagnosis, treatment and biology of cancer. *See, e.g.*, *Catalog of Federal Domestic Assistance*, *available at* http://12.46.245.173/cfda/cfda.html; *NIH Awards to Domestic Institutions of Higher Education, By Rank FY 2004*, *available at* http://grants.nih.gov/grants/award/trends/dheallinst04.htm (last visited Sept. 18, 2005).

In addition to federal grants for medical and scientific research, the Solomon Amendment affects federal grants and contracts for subjects from training future doctors and nurses

to training future elementary school teachers on how to work with students with disabilities and students who face language barriers. *See, e.g., USC Sponsored Project Activity—Active Awards as of Sept. 1, 2005, available at* http://www.usc.edu/dept/contracts/stats/PI.ACT040804.txt (last visited Sept. 18, 2005).

3. *Law Schools Receive Few, If Any, Federal Funds Affected by the Solomon Amendment.*

While the nation's universities depend heavily on federal funding for research and support affected by the Solomon Amendment, their affiliated law schools receive virtually no federal funding covered by that law. The vast majority of federal funds tha benefit the nation's law schools consists of funds for student financial assistance, which are explicitly exempt from the conditions imposed by the Solomon Amendment. *See* Dep't of Defense Appropriations Act of 2000 § 8120, Pub. L. No. 106-79, 113 Stat. 1212, 1260 (1999); 10 U.S.C. § 983(d)(2); JA 147 ("The Law School does not receive significant federal funding. . . . The University, however, annually receives approximately $328 million from the federal government, which comprises approximately 16% of its operating budget.") (quoting Robert C. Clark, former Dean of Harvard Law School); JA 84-85 (noting that while Yale University receives $300 million in federal funds annually, Yale Law School receives little, if any, federal funding); *see also Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 174-75 (D. Conn. 2005).[5]

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[5] The patterns are the same at other major research universities. For example, Stanford University ranks fourth among the nation's 120 degree-granting institutions receiving funds from the federal government. *See Digest of Education Statistics, 2003*, Table 344, U.S. Dep't of Educ., Nat'l Center for Educ. Statistics, *available at* http://nces.ed.gov/programs/digest/d03/tables/dt344.asp (last visited Sept. 17, 2005). While Stanford University receives over $600 million in federal funds annually, *id.*, Stanford Law School has received no federal funding apart from

B. Aiming At Speech Outside the Scope of Federally Funded Programs Imposes An Unconstitutional Penalty.

"[W]hen the government appropriates public funds to establish a *program* it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194 (emphasis added). Thus, for example, if the government offered funding to law schools for their career services programs, it might set terms or conditions for its use. But as *Rust* also made clear, the government may *not* place a speech-restrictive "condition on the *recipient* of a subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197 (emphasis in original). This, of course, is exactly what the Solomon Amendment does.

This feature of the Solomon Amendment, which arises from its current application to require that any subelement's violation triggers a loss of funding to the entire university as a whole, is an impermissible form of government overreaching in violation of the First Amendment. Such overreaching is especially inappropriate here, because, as *Rust* reiterated, "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditures of Government funds is restricted" by basic First Amendment principles. *Id.* at 200.

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student financial aid in the past four years. Stanford University, *Sponsored Projects Report (FY 2004)*. Likewise, while the University of Southern California receives over $350 million annually in federal money, *see Digest of Education Statistics, 2003*, Table 344, few, if any of these funds go to USC Law School. *See generally Distribution of Awards From Funding Sources to USC Academic Revenue Centers—FY2004*, http://www.usc.edu/dept/contracts/graphs.html (last visited Sept. 18, 2005).

This Court has long held that the government may not use the leverage of a federally funded program to suppress protected speech outside that program. In *Regan v. Taxation With Representation of Washington ("TWR")*, 461 U.S. 540 (1983), for example, this Court held that Congress need not subsidize the lobbying activities of charitable organizations by allowing them tax-deductible contributions to support their lobbying. Critical to the Court's holding, however, was that these organizations remained free "to receive [tax-deductible] contributions to support . . . nonlobbying activit[ies]" through their organizational affiliates. *Id.* at 545; *see id.* at 553 (Blackmun, J., concurring).

In *FCC v. League of Women Voters ("LWV")*, 468 U.S. 364, 400 (1984), by contrast, the Court invalidated a law withholding federal funds from public radio and television stations that engaged in editorial broadcasts. As distinct from the tax provisions upheld in *TWR*, the Court emphasized, the government here had impermissibly allowed a broadcast station "no way of limiting the use of its federal funds to all noneditorializing activities" while pursuing its editorializing activities through the use of other funds, such as the donations of private listeners. *LWV*, 468 U.S. at 400. Thus, although Congress need not use its own funds to support speech it disapproves, it may not withdraw funding from recipients merely because they use other *nonfederal* funds to engage in disapproved speech. Like *LWV*, *Rust* emphasized the crucial distinction between setting the terms of a government *grant* and limiting all speech engaged in by the *grantee*. *See Rust*, 500 U.S. at 197; *see also* Brief for the United States, *Rust v. Sullivan*, No. 89-139, at 20-24.

This contrast between permissible nonsubsidies and impermissible penalties is not limited to speech, but is a common feature of this Court's protection of individual liberties from government overreaching. For example, the government is free to decline to pay for abortions, but it is not free to deny food stamps or Medicaid payments for foot

surgery because an otherwise eligible recipient has had an abortion. *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980); *Maher v. Roe*, 432 U.S. 464, 474 n.8 (1977) ("If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, . . . strict scrutiny might be appropriate under [a] penalty analysis. . . .").

This Court has likewise imposed in the takings context a requirement of nexus between the purpose of a government benefit and any condition the government might attach to it. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), for example, the Court held it impermissible for a state to require that property owners seeking a permit to enlarge their beachfront house grant the public a permanent easement of access to walk across their property to the sea—even though it would have been permissible to require them to "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836. The Court explained: "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." *Id.* at 837 (citations omitted).

The Solomon Amendment works a similar "out-and-out plan of extortion" through the sweeping scope of its funding cutoff. On-campus military recruiting cannot be deemed germane within the meaning of *Rust* or *Nollan* to the academic research purposes for which the affected funds were granted. All of the medical and scientific research outside law schools that is targeted by the Solomon Amendment is of course independently protected by the constitutional right of academic freedom.

Moreover, here, as in *LWV*, the Solomon Amendment's threat of a university-wide funding cutoff if any "subelement" of the university inhibits military recruiting makes it impossible for the recipient of government funds "to

segregate its activities according to the source of its funding." 468 U.S. at 400. This makes little sense, for the government can easily reach law school funding without implicating other educational units of the university. Law schools are typically physically separate from other parts of their university and their budgets can be easily separated. Thus it would be a simple matter for a university, like the family planning clinics in *Rust*, to segregate all government funds for research from the unrelated expression that Congress finds objectionable.

Nothing in this argument raises constitutional doubts about Title VI or Title IX of the Civil Rights Act of 1964, under which the federal government conditions universities' receipt of funds on their agreement to enforce prohibitions of discrimination on the basis of race, color, national origin and gender. *See* 42 U.S.C. § 2000d; 20 U.S.C. § 1681(a). To be sure, when Congress overrode this Court's decision in *Grove City College v. Bell* by statutory amendment, the funding conditions of Titles VI and IX were extended to the entire college or university when any part of it receives federal assistance. *See* 20 U.S.C. § 1687.

The conditions imposed by the Solomon Amendment, however, are entirely distinct from those imposed by Titles VI and IX for several reasons. First, the conditions imposed by the Solomon Amendment are imposed for the purpose of suppressing the expression and academic freedom of university faculties, and this is not true of Titles VI and IX. *See* Part I above.

Second, the conditions imposed by the Solomon Amendment are unrelated to the subject matter of the federal research funding that they place in jeopardy. The conditions that Titles VI and IX impose, by contrast, satisfy any substantial nexus requirement, because in these statutes the government's interest is that race or sex discrimination be eliminated from each and every educational program throughout the university.

Finally, Congress has a compelling interest in preventing tax dollars provided by all taxpayers, from being provided to entities that would discriminate against taxpayers themselves on irrelevant grounds. As this Court has held in the different context of determining the scope of congressional authority, the long history of the government's efforts to eradicate discrimination based upon race and sex has justified the need for extraordinary prophylactic measures. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28, 730 (2003) (sex); *see id.* at 737-38 (race). In the context of the Solomon Amendment, Congress faced a different history. The military had been able to fulfill its proper instrumental goal of recruiting law students to its ranks. There was no need to deploy the drastic penalties used by the Solomon Amendment as any sort of prophylactic measure that would justify such a gross intrusion into universities' academic freedom and ordering of their internal affairs.

CONCLUSION

For these reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

DONNA R. EUBEN
ANN D. SPRINGER
DAVID M. RABBAN
ROBERT C. POST
AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS
1012 Fourteenth St., N.W.
Suite 500
Washington, DC 20005
(202) 737-5900

KATHLEEN M. SULLIVAN
Counsel of Record
VALERIE M. NANNERY
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
Suite 560
Redwood Shores, CA 94065
(650) 801-5000

Counsel for Amicus Curiae

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No. 04-1152

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense, *et al*,
Petitioner,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC., *et al*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

PETER FERRARA
Counsel of Record
1232 Pine Hill Road
McLean, Virginia 22101
(703) 917-4247

Attorney for the Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

The enclosed brief of *Amicus Curiae* American Civil Rights Union in support of petitioners was filed with the Court on July 25, 2005, apparently past the deadline for filing by a few days. The delay was caused by an erroneous miscommunication regarding the date of the Petitioners' filing. All parties have consented to the filing of this brief, with the letters of consent attached to the Certificate of Service filed with the brief. None have been prejudiced. Therefore, *Amicus Curiae* American Civil Rights Union requests leave to file this brief out of time.

PETER FERRARA
Counsel of Record
1232 Pine Hill Road
McLean, Virginia 22101
(703) 582-8466

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BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS*[*]

The American Civil Rights Union (ACRU) was established in 1998 as a Section 501©)(3) educational and legal charity dedicated to basic constitutional issues. Its purpose, as stated on its Internet webpage, is to advance civil rights because "Civil rights are the fundamental liberties that all Americans should enjoy as a matter of basic morality, as well as constitutional protection."

[*] This *amicus curiae* brief filed in support of the Petitioners was funded solely by the ACRU and is authored entirely by counsel for the ACRU. In accord with the Rules of the Court, letters of consent from the parties are being lodged herewith.

The Policy Board of the ACRU consists of: Hon. Robert B. Carleson, Chairman; Hon. Edwin Meese, III; Judge Robert Bork; Hon. Linda Chavez (Emerita); Mr. Joseph Perkins; Hon. William Bradford Reynolds; Professor James Q. Wilson; Ambassador Curtin Winsor, Jr.; Dean J. Clayburn LaForce; Professor Walter Williams; and Hon. Ken Tomlinson (Emeritus).

The interest of the ACRU in this case is two-fold. The interest of the amicus in the First Amendment freedoms of speech and association were demonstrated in its brief for the Petitioners in *Boy Scouts of America v. Dale*, 530 US 640 (2000). Its interest in the present case is its concern that the First Amendment and this Court's conclusions in the *Dale* have been misinterpreted and misapplied here, by the Circuit Court.

The other interest of the amicus in this case is that other, equally important provisions of the Constitution have been given short shrift by the majority of the Circuit Court panel. As the dissenting judge there noted, the public safety of citizens of the United States are at risk now. The War Powers provisions of the Constitution and related military provisions of the US Code are implicated seriously when a court undertakes to instruct the military how it much conduct the recruitment of its (all voluntary) personnel, in time of war.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Court stated the question presented as "whether the court of appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement."

As the court below noted, and so has this Court in prior cases, jurisdiction is basic and can be addresses at any level

where its absence can be shown. So the ACRU addresses that question first.

Beyond that, there are several different approaches to the single question the court posed. The amicus suggests that the court below has misstated and over-applied the First Amendment in this case, and at the same time has given too little consideration to two established lines of cases, one on the use of the Spending Power by Congress in legislation, and the other, the application of constitutional powers and code provisions concerning the establishment and conduct of the American military.

I. DOES THIS COURT HAVE SUBJECT MATTER JURISDICTION TO DECIDE THIS CASE ON THE ISSUE RAISED BY THE PLAINTIFFS AT TRIAL, RESPONDENTS HERE?

Although jurisdiction is not part of the Question Presented in the grant of Certiorari in this case, jurisdiction is always basic and can be raised at any level. Not even agreement between the parties that jurisdiction existed below, can absolve this Court from considering whether jurisdiction exists in the case and therefore that this Court can proceed with the case.

Note the case of *Elk Grove Unified School District v. Newdow*, __ US __, Case No. 02-1624, decided 14 June, 2004. Although both courts below had found they had jurisdiction in the matter, and although this Court agreed with them (and with the media and the public) that the issue presented was important and continuing, this Court found there was a lack of jurisdiction in that case, and remanded with instructions to dismiss. A similar logic applies here.

More than half of the trial court decision in this case was dedicated to standing, ultimately concluding that the Forum for Academic and Institutional Rights, Inc., and its associates

(collectively called "FAIR" hereafter) did have standing. A significant part of the Court of Appeals decision likewise discussed that subject. While there clearly is personal jurisdiction, in that FAIR can claim to represent law schools generally, that answers only half of the question.

The Opinion of the Court of Appeals, below, recognized that it did not base its finding of jurisdiction on anything but the corporate representative, FAIR, Inc. The court said in footnote 7, "While the government does not concede that the non-FAIR plaintiffs had standing, the presence of one plaintiff with standing is sufficient to satisfy that requirement." [Citation omitted.]

This Court has been quite clear over the years that jurisdiction is not conferred by the claim of an undifferentiated interest in the public policy the parties seek to challenge. Instead, a party must allege and establish some "specific injury" above and beyond the complaint of an average citizen and/or taxpayer. The most thorough reviews of the boundaries between mere citizen interests and cognizable standing have occurred in Sierra Club cases, including *Ohio Forestry Association, Inc. v. Sierra Club*, 523 US 726 (1998), and cases there cited.

There is no allegation in either of the lower court decisions in this case that a single individual joining this case as an individual or represented by any of the group or organizational parties to this case, has suffered any "specific injury." There is no allegation that any individual involved directly or indirectly in this case is now, or ever was, a member of the military or would-be member of the military who was harmed by the application of the "Don't ask; don't tell" policy of the American military.

To make up for this critical lack, FAIR claims that it has suffered specific harm because its associated law schools "have been forced to change their non-discrimination poli-

cies" due to the application of the Solomon Amendment. However, the record does not reflect that the federal government ever asked for or sought any alteration in the policies of the law schools. If the schools did abrogate their policies, this was on their own hook and not due to any actions by the federal government. To allow the law schools to claim subject matter jurisdiction because they shot themselves in the foot is not a legitimate basis for a finding of standing.

The law schools did have the alternative of challenging the military policy directly in court on behalf of interested and affected parties. Precisely such a case is going to trial in US District Court in Massachusetts as this brief is being written. On 6 July, 2005, hearings will begin in Boston in the case filed by the Servicemembers Legal Defense Network, which claims to represent individuals who were/are directly and specifically harmed by the military recruitment policies supposedly at issue, here. The Internet citation on this coming hearing is: http://www.cnsnews.com//ViewNation.asp?Page=\Nation\archive\200506\NAT20050606a.html

In short, there is a serious question whether any Plaintiff or Respondent in this case satisfies the requirements of subject matter jurisdiction over the military recruitment issue they seek to challenge here. If the Court is satisfied that standing is lacking, it should dismiss this case for want of jurisdiction, as it did in *Newdow, supra*.

II. DID THE COURT OF APPEALS ERR BY TREATING THIS AS A FIRST AMENDMENT CASE, RATHER THAN RECOGNIZING THAT IT IS, IN FACT, A SPENDING POWERS CASE?

The Circuit Court below seeks to dispense with this subject in a footnote. It claims in footnote 9 that in certain cases involving library finding, the government was not barring existing spending, but conditioning future spending on set conditions. The court there wrote, "That exception does not

apply in our case because the Solomon Amendment does not create a spending program; it merely imposes a penalty—the loss of general funds."

The history of Spending Power cases demonstrates, however, that the distinction the court below sought to draw is totally irrelevant.

The leading case on this subject is *South Dakota v. Dole*, 483 U.S. 203 (1987). That case upheld a federal law to withhold federal highway funds from any state which failed to establish a minimum drinking age of 21 years old. The federal highway funds came from the Interstate program, in part, which dated back to the Eisenhower Administration. This Court found no legal relevance in the age of the spending program at issue. Instead, it found four criteria to decide whether a congressional restriction was constitutional, when connected to a federal funding program for the states.

These four criteria were reapplied in *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), *cert. denied*,. 493 US 1070 (1990). The *Nevada* case involved the conditioning of federal highway funds on the states' establishing maximum speed limits on their highways of 55 MPH. The reasons stated for this action by Congress were reduction in foreign oil needs and reduction in highway fatalities.

By the time of the *Nevada* case, the issue of spending restrictions was so clear that this Court did not even take the case. It declined certiorari, and left standing the lower court decision upholding the federal law. However, the lower court in *Nevada* repeated and applied the four criteria established by this Court in *Dole*. They are:

> First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" And in doing that, the Court should "defer substantially" to the judgment of Congress.

> Second, Congress must act "unambiguously" so the states can "exercise their choice knowingly, cognizant of the consequences of their participation."
>
> Third, the restrictions placed on federal funds must be related "to the federal interest in particular national projects or programs."
>
> Fourth, "other constitutional provisions may [NOT] provide an independent bar to the conditional grant of federal funds." As the Court explained, the Spending Power "may not be used to induce the States to engage in activities that would themselves be unconstitutional." As this Court concluded in *Nevada, supra*, "Here, as in *Dole*, if the State were "to succumb to the blandishments offered by Congress * * *, the State's action in so doing would not violate the constitutional rights of anyone." [Citing *South Dakota v. Dole, supra*, at page 211.

With both the drinking age requirement and the (since repealed) 55 MPH requirement, Congress was attaching a condition to the states' receipt of long-established federal highway funds. So, the distinction the court below sought to draw in Spending Power cases is wrong.

This same conclusion, that Congress can "encourage" states to act or not act in certain ways, by attaching conditions to the grants of federal aid, is most recently confirmed in *New York v. United States*, 505 U.S. 144 (1992). While this case concerned a more invasive effort by Congress, to cause the states to enact provisions for the storage of low-level nuclear waste, it approved as a lesser and permitted action the conditioning of federal fund grants as in the prior cases and as in the current case.

All of these prior cases concerned effects of federal funding conditions on state governments. These faced different and higher barriers in that states are (apparently) protected by the Tenth Amendment, whereas the law schools

at issue here are not cloaked by any suggested form of governmental immunity.

The opposite bookend of Spending Power cases is *Grove City College v. Bell*, 465 U.S. 555 (1984). In that seminal case, this Court dealt with the claim by the federal government that the nondiscrimination provisions of Title IX of the Educational Amendments of 1972 should apply to Grove City. The College defended on the basis that it did not accept any federal funds which would trigger the enforcement of the Title.

The Court ruled in favor of the College, in a complex series of decisions. Justice White wrote the Opinion, joined by Chief Justice Burger, and Justices Blackmun, Powell, Rehnquist and O'Connor. Justices Brennan, Marshall and Stevens joined in all but Part III. Justice Powell filed a Concurrence, joined by the Chief Justice and Justice O'Connor. Justice Stevens filed a Concurrence in Part and Concurrence in the Result. Justice Brennan filed a Concurrence in Part and Dissent in Part, joined by Justice Marshall.

Cutting through the thicket to the basics, Grove City College did not accept any direct aid from the federal government. As the Opinion noted at footnote 3, this was a deliberate choice by the College. "Grove City's desire to avoid federal oversight has led it to decline to participate, not only in direct institutional aid programs, but also in federal student assistance programs under which the College would be required to assess students' eligibility and to determine the amounts of loans, work-study funds, or grants they should receive."

However, the College did enroll some students who were entitled to receive "Basic Educational Opportunity Grants (BEOG's)" from the Department of Education. The College argued that these were not "direct aid" to the College because they were not payable to the College. They were payable to

the students at their initiative to assist them with their college expenses regardless of what college they might attend.

The Court concluded that the BEOG grants did amount to federal aid, but only to its scholarship programs, not university-wide, including in sports programs.

The reason for this extended discussion of this elderly (but still applicable) decision is in its final paragraph. The last argument of the College was that the federal government, in requiring the College to comply with certain requirements on actions and documents to be filed.

> Grove City's final challenge to the Court of Appeals' decision—that conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the College and its students—warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. . . . Grove City may terminate its participation in the BEOG program and thus avoid the requirements of 901(a). Students affected by the Department's action may either take their BEOG's elsewhere or attend Grove City without federal financial assistance. Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its students. [Citations omitted.]

Applying the same logic to the present case, the law schools here are immediately free of the military recruitment provisions that they claim are so onerous by declining the federal aid to which that provision is attached.

Surely it is human nature to prefer to receive money without complying with the contractual obligations that come with the money. The schools of law would obviously have healthier balance sheets if they did not have to provide to all

students the education for which they paid. Likewise, the schools would benefit if they could reduce their faculty costs by not paying some of their professors. And what if these law schools could invest their endowments as they chose, but then ignore the terms of those investments by requiring all brokerages to cover any losses that might occasionally occur.

In short, the position of these law schools is essentially unworthy of the logical thought one would expect from law school faculties and staff. Were they aware of the conditions established by Congress when they accepted the money? Yes, they were.

Knowing that, did they accept the money? Yes, they did.

Did they know they could have avoided the requirements of the Solomon Amendment by refusing to accept federal aid after the date of that Amendment? Yes, they knew that.

The conclusion seems inescapable that the Respondents here simply want to welsh on a deal that they fully understood at the time they entered into it. The experienced litigators (and professors) for FAIR certainly were aware of the *Grove City College* case from day one. And under that case, the Respondents are not entitled to relief.

III. DID THE COURT OF APPEALS ERR BY CONCLUDING THAT THE RESPONDENTS SUFFERED ANY ACTIONABLE HARM IN THIS CASE WHICH CAN OVERBALANCE THE HARM TO THE US MILITARY?

As noted in the previous section, the harm allegedly done to the Respondents in this case is self-inflicted. Like Sheriff Bart (Clevon Little) in the satiric movie, *Blazing Saddles*, they have put a gun under their own chin, and then sought a sympathetic response in return. But the other side of the harm equation is only slightly explored in the court below.

The Opinion of the Court of Appeals pays no attention to the fact that military recruitment is the specific governmental activity which would be curtailed by the court's decision. The Dissent at least raises this point. But neither opinion noted that this is military recruitment of an all-volunteer military, during wartime.

Congress has the power to declare war. Constitution, Article I, Section 8, clause 11. Once war has been declared, the conduct of that war is in the hands of the President as Commander in Chief. Constitution, Article II, Section 2, clause 1. The Dissent in the Circuit Court notes, at the beginning of Section II of its slip opinion, all of the constitutional provisions concerning the financing and conduct of war.

Not even the Dissent, however, notes this extremely important fact: The United States has been at war, and relying on a volunteer military, at all times relevant to this case.

Senate Joint Resolution 23 was adopted on 18 September, 2005. Its operative language is, "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Congress left no doubt that it was exercising its War Powers by stating that its action was "[c]onsistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." It is not by accident that Congress in 2001, and again a year later, used almost identical language to what Congress used in 1805 to authorize

President Jefferson to pursue the Barbary Pirates "as necessary" across international boundaries. That was the only other instance where a Declaration of War by Congress did not name one or more nations as the object of the Declaration. The text of SJR 23 is found on Yale University's Avalon Project at this address: http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm

For those who argue that an "Authorization to Use Military Force" is not a true declaration of war, there are two answers. The first is that the Constitution does not specify any particular language for a declaration of war. But the other reason is that some of the hundreds of people who wrote and ratified the Constitution were present in the federal government when Congress authorized war against the Barbary Pirates. If the people who wrote the Constitution considered the 1805 Resolution an adequate and constitutional declaration, then a duplicate of that is adequate today, against the latest threat from outlaw terrorists.

SJR 23 was enrolled as Public Law No: 107-40, after it was signed by the President on 18 September, 2005. Under the Constitution, however, only a Joint Resolution by the Houses of Congress is required. Any signature or other action by the President is legally surplusage.

Both the actions of Congress in financing or approving military action, and the actions of a President in directing military actions, is entitled to a relatively high deference from the courts in any legal examination. This is true even when there is no declared state of war. See, *Campbell v. Clinton*, 203 F.3rd 19 (D.C. Cir. 2000), cert. denied 121 S. Ct 50 (2000), which concerned certain military actions by the United States in the former Yugoslavia.

Such judicial deference is even more important in times of declared war. See this Court's unanimous decision in, *In Re Quirin*, 317 US 1 (1942).

The granting of a preliminary injunction is the precise question in this case. When it is noted that the Respondents suffered no injury whatever (other than self-inflicted), and that the damage to the Petitioners is an impairment of the military in time of declared war, the balancing of the equities comes out the opposite of the conclusion of the court below. The injunction should have been denied.

IV. DID THE COURT OF APPEALS ERR IN OTHER WAYS WHOSE CUMULATIVE EFFECT IS THAT ITS JUDGMENT SHOULD BE REVERSED AND REMANDED?

There are a number of smaller errors by the court below which lead cumulatively to the conclusion that it is in error. Those are discussed here, in roughly their order of importance.

The Dissent below notes but does not discuss a question of choice of legal tactics by FAIR in this case. The instant case seeks a First Amendment ruling against the policies of the military concerning homosexuals. But this precise issue has already been litigated and decided in seven Courts of Appeal, and this precise question will surely arrive in this Court in due course. The Dissent writes, "it bears note that the military's policy against homosexual activity . . . previously has been adjudged by a number of our sister courts of appeal not to violate the Constitution. . . ." [Citations omitted. Slip opinion at p. 72.]

What the Dissent does not note, but this Court should, is the radical difference between the approach of all federal courts to First Amendment issues, as opposed to their approach to military discipline issues. In the latter cases, the courts have long recognized that judges are particularly ill-equipped to direct or control specific decisions concerning the conduct of the American military. In the former cases, federal courts defer to no one and no institution in their

judgments on what does, or does not, involve a violation of First Amendment rights.

Comparing these two lines of cases suggests that FAIR and its allies and counsel have simply sought to construct a case and an argument to turn a military discipline issue (already being litigated and headed for this Court) into a First Amendment case. And this result-oriented approach is designed to create a legal victory in a subject which has already been lost in two-thirds of the Circuit Courts.

The Dissent below approaches this subject when it writes with personal candor,

> What disturbs me personally and as a judge is that the law schools seem to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought to the effect of their action on the supply of military lawyers and military judges in the operation of the Uniform Code of Military Justice.

The Court of Appeals below inferentially recognizes that FAIR and its allies may have engaged not in forum shopping, but in issue shopping. It writes in footnote 27, "We note that this is not a case involving military discretion to determine whether internal policies are necessary and appropriate. . . ." [Citation omitted.] The entire thrust of this case is against the military's recruitment policies concerning homosexuals, and unless one has been living under a rock, one knows that this has been a public policy issue since the first days of the Clinton Administration.

The court below reveals perhaps too much of its thinking when it writes,

> But it does not follow that recruiting by means of the Solomon Amendment is effective. On the contrary, it seems to us equally plausible that the Solomon Amendment has in fact hampered recruitment by

> subjecting the military's exclusionary policy to public scrutiny. (Slip Opinion, at p. 60.)

The ACRU suggests that the lower court revealed by that comment the real basis for its decision. It considers the Solomon Amendment to be a self-defeating policy error, and wants to dispense with it. But deciding what public policies are desirable, and whether they are effective and should be continued, is not a *judicial* function. That is a *legislative* function, which with respect to the military is in the hands of Congress.

The next error is one of particular interest to the ACRU. This amicus participated in, and supported this Court's ultimate decision in *Boy Scouts of America v. Dale*, 530 US 640 (2000). The principles of that case are badly abused by the Opinion of the Circuit Court below.

Dale confirmed the "freedom of association" as a basic right of the Boy Scouts under the First Amendment. The court below concluded that the freedom of association of the law schools here was violated by the "requirement" that military recruiters have equal access to the campuses, etc., and that the schools were "forced to associate" with the message of the military.

This analysis is wrong at both ends of the equation. First, there is no "requirement" that the military recruiters have access to the law school campuses. As noted in the Spending Power analysis, above, the schools are entirely free to refuse access to the recruiters, so long as they choose not to accept the hundreds of millions of dollars in federal aid to themselves and their universities.

The other error, however, is to claim that the schools are "associated" with the views of the military. The decisions of the lower courts (all that is available to this amicus as this brief is written) do not include a list of the businesses and institutions which regularly recruit for potential employees at

these law schools. This Court can take judicial notice of the fact that significant numbers of graduating lawyers do not go into the practice of law, but instead go into the business, corporate, charitable and academic positions, where their training can still be well applied.

The ACRU suggests that an examination of the lists of all recruiters who have come to these law school campuses during the pendency of this litigation will probably include all major corporations in the United States. And that means corporations which were "major" at the time, regardless of their subsequent business fates. In short, if the lists go back far enough, such collapsed giants as Enron, World Com, and Arthur Andersen will probably appear.

By definition, the law schools have no more or less "association" with these corporate recruiters, than with the military recruiters. Does that mean that these law schools are sending the message that they are in favor of what these corporations have done—massive corporate fraud? Massive document shredding? (Yes, the recent reversal of the criminal convictions of Andersen are noted. But are these law schools teaching their students that when trouble looms on the corporate horizon, they should run the shredders until the motors burn out?)

The legal approach taken by FAIR to the association of law schools and recruiters entirely (and perhaps deliberately) misses the point. The law schools are not associated in a First Amendment sense with any recruiters, including the military ones. The only true association, in the *Dale* sense of the word, occurs when individual students at those schools choose to accept employment opportunities as offered.

There is no suggestion in this record that any graduate of any of the law schools present in this case has been forced to accept any association that he/she finds unacceptable. In fact, the whole point of the process is to present students about to graduate with the widest possible list of opportunities in

salary, working conditions, job satisfaction, so that each can make his/her best possible choice. There is a "freedom of association" violation in curtailing this process, which is what FAIR seeks and the court below did. But there is no such violation in permitting this process to continue, as provided in the Solomon Amendment.

The third general error of the Circuit Court below was to presume that the law schools were being forced to adopt a political judgment they disagreed with, and with no opportunity to object. Again, both ends of this logical analysis are wrong.

As pointed out in the Spending Power analysis, above, the law schools are not being "forced" to say or do anything. They are in their current posture because they choose to accept millions of dollars in taxpayer money, provided by Congress subject to certain conditions. But at the other end of that logical analysis, the law schools remain free to say what they choose to about military recruiting, through their faculty, staff and students, in speaking or in print, as they choose.

The position of the law schools is no different than that of airports, shopping malls, etc., which have found themselves obligated to allow on their premises (in limited forms) spokesmen for various causes that the management wished to disassociate from. Such situations are routinely handled by published or posted disclaimers which make clear that the views of the speakers are not those of the management of the premises.

The law schools here advance no reason why the same sort of caveats might not save them from any inference that they accepted the "messages" of the military. This case is not about freedom of speech, it is about hostility to the American military. The First Amendment does, of course, protect every law school dean, professor, and student who harbors that hostility. But it does not protect the law schools as corporate entities when they seek to enforce that majoritarian (but

not universal) view in violation of clear federal law to the contrary.

CONCLUSION

The courts below found that jurisdiction existed, without examining whether any Plaintiff below, Respondent here, suffered any personal injury which would justify any remedy from the courts. If this Court agrees with that analysis, the decision of the Circuit Court should be reversed and remanded, with instructions to dismiss for want of jurisdiction.

The other defects that the American Civil Rights Union perceives in the decisions below all have to do with the respective harm to the two sides in this case, and the balancing of the equities. Especially when the Respondents are the leaders of the American military, who are conducting military actions with an all-volunteer force in a time of declared war, it should be clear that the Circuit Court did not properly weigh the competing interests, to reach the conclusion that it did.

Wherefore, the ACRU urges the Court either to reverse and remand the case with instructions to dismiss for want of jurisdiction, or to reverse and remand with instructions to reconsider based on factors concerning the harm to the respective parties in this case, which were not considered, or not adequately considered, on trial and appellate review to date.

Respectfully Submitted,

PETER FERRARA
Counsel of Record
1232 Pine Hill Road
McLean, Virginia 22101
(703) 917-4247

Attorney for the Amicus Curiae

(35)

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *et al.*,

Petitioners,

—v.—

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, GAY & LESBIAN ADVOCATES & DEFENDERS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL CENTER FOR LESBIAN RIGHTS, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

Kenneth Y. Choe
(*Counsel of Record*)
Steven R. Shapiro
Matthew A. Coles
James D. Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street
New York, New York 10004
(212) 549-2500

Attorneys for Amici

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INTERESTS OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 400,000 members that is dedicated to defending the principles embodied in the Constitution, including those guaranteeing freedom of expression. This case raises issues of profound importance to the ACLU and its members. The ACLU has long opposed government efforts to compel a speaker to participate in the dissemination of a favored government message. The ACLU has also long opposed government efforts to penalize a speaker based on the speaker's viewpoint. The ACLU has appeared before this Court on numerous occasions in support of these principles both as party counsel and as *amicus curiae*.

Gay & Lesbian Advocates & Defenders ("GLAD") is New England's leading public interest organization representing lesbians, gay men, bisexuals, transgendered people and people with HIV and AIDS. GLAD has litigated widely in New England on discrimination issues in employment, education, services and public accommodations under state and federal non-discrimination laws. In addition, GLAD has litigated in the area of the First Amendment, representing parties seeking to assert First Amendment and free speech and associational rights as well as those defending against overly broad speech-related claims challenging the robust enforcement of non-discrimination laws. GLAD was counsel for the band of gay marchers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) and proposed intervenors

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *Amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003).

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization with more than 35,000 members that is committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal frequently has appeared as party counsel and as *amicus curiae* before this and other federal and state courts across the country, including in cases addressing First Amendment rights and rights to be free from invidious discrimination. The issues raised by this case are of great importance to the communities Lambda Legal serves.

The National Center for Lesbian Rights ("NCLR") is a nonprofit legal organization dedicated to achieving full equality for lesbian, gay, bisexual, and transgender people and their families. Since 1977, NCLR has litigated to end discrimination on the basis of sexual orientation and gender in family law, employment, education, immigration, and access to public accommodations. NCLR has litigated on behalf of parties seeking to exercise their First Amendment rights to freedom of speech and association, as well as on behalf of those seeking to defend viewpoint-neutral non-discrimination laws.

People For the American Way Foundation ("People For") is a nationwide, nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has more than 600,000 members and activists across the country. Central to People For's mission are both the preservation of freedom of speech and the advancement of equal opportunity for all Americans, including gay and lesbian Americans.

People For regularly participates in litigation and non-litigation advocacy nationwide to combat discrimination and promote free speech and equal rights. People For has joined this brief in order to help vindicate the fundamental constitutional rights violated by the Solomon Amendment.

STATEMENT OF THE CASE

The Forum for Academic and Institutional Rights (FAIR) – an association of law schools – and other law school-affiliated organizational and individual plaintiffs brought this case challenging the Congressional mandate that requires universities and their subsidiary schools, including FAIR's member institutions (hereinafter, "Respondents"), to allow military employers to participate in their recruitment programs or lose virtually all of their federal funding.

Respondents administer recruitment programs for the benefit of their students and prospective employers. These recruitment programs consist of dialogue between employers and students – students seeking to persuade select employers to make offers, and employers seeking to persuade select students to accept them – as well as Respondents' communications with employers and students that enable this dialogue. *See* Amicus Br. of Law Sch. Career Serv. Prof'ls, at 7-17.

Respondents do not allow all prospective employers to participate in their recruitment programs. They require participating employers to certify that they do not discriminate in employment based on sexual orientation, among other characteristics. Respondents do this because they believe that employment discrimination is harmful and, thus, they are unwilling to assist employers that engage in such discrimination. *See* Court of Appeals Joint Appendix 330-31 (Decl. of E. Joshua Rosenkranz ¶¶ 7-8).

Under their policy commonly known as "don't ask, don't tell," military employers do not employ openly lesbian or gay servicemembers. *See* 10 U.S.C. § 654. Accordingly, unlike prospective employers that Respondents allow to participate in their recruitment programs, military employers cannot certify that they do not discriminate in employment based on sexual orientation.

Through the Solomon Amendment, Congress has required Respondents and their parent universities to allow military employers to participate in their recruitment programs, notwithstanding their discriminatory employment policies, or lose virtually all of the universities' federal funding. The Solomon Amendment provides, in relevant part, as follows:

> No funds described in [10 U.S.C. § 983(d)(1)] may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents . . . the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.

10 U.S.C. § 983(b)(1). With limited exception, the federal funds put in jeopardy by the Solomon Amendment are all funds made available by the Department of Defense, the Department of Homeland Security, the Central Intelligence Agency, the National Nuclear Security Administration, the

Department of Transportation, and all agencies funded by the Labor, Health and Human Services, Education, and Related Agencies Appropriations Act. 10 U.S.C. § 983(d)(1).

Respondents moved for a preliminary injunction to enjoin enforcement of the Solomon Amendment. In support of their motion, Respondents argued, among other things, that the Solomon Amendment constitutes an unconstitutional condition in violation of their right to free expression guaranteed by the First Amendment to the Constitution. The United States District Court for the District of New Jersey denied Respondents' motion. The United States Court of Appeals for the Third Circuit reversed and remanded with instructions to grant Respondents' motion but stayed its ruling pending review by this Court. This Court granted *certiorari*.

SUMMARY OF ARGUMENT

As both a form of compelled speech and a form of viewpoint discrimination, the Solomon Amendment constitutes an unconstitutional condition in violation of Respondents' right to free expression.

By commandeering Respondents' recruitment programs to disseminate the recruitment messages of military employers, the Solomon Amendment infringes Respondents' right not to speak. The infringement is only exacerbated by the fact that the Solomon Amendment commandeers resources that are essentially communicative.

The Solomon Amendment also regulates speech in a viewpoint discriminatory manner. It distinguishes between universities that seek to express their disapproval of military employers for pacifist reasons, and those that seek to express their disapproval of military employers for any other reason. It privileges a class of speakers – military employers – and privileges its speech by empowering military employers to

force their way into the communications between employers and students that lie at the core of Respondents' recruitment programs. The legislative history of the Solomon Amendment makes clear that it was enacted to retaliate against law schools for expressing disapproval of the employment policies of military employers.

Finally, the government has failed on this record to meet the burden of justification required by its abridgement of First Amendment rights.

ARGUMENT

A. The Solomon Amendment Constitutes an Unconstitutional Condition

In this brief, *Amici* focus their attention on why the Solomon Amendment constitutes both compelled speech and viewpoint discrimination rather than why the Solomon Amendment otherwise constitutes an unconstitutional condition.

Nevertheless, it bears emphasis that, where a grant of funds is conditioned on a restriction on speech, this Court examines whether the subject of the restriction is related to the object of the funds. The government may not "place[] a condition on the *recipient* of [a] subsidy rather than on a particular program or service" and thereby "effectively prohibit[] the recipient from engaging in . . . protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). Most federal funds received by a university and put in jeopardy by the Solomon Amendment are not directed toward programs involving military concerns. That fact

significantly bolsters the conclusion that the Solomon Amendment constitutes an unconstitutional condition.

B. The Solomon Amendment Compels Respondents to Assist in Disseminating the Recruitment Messages of Military Employers

This Court has long recognized that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Accordingly, "the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

The autonomy protected by the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citations omitted). This is so because "*all* speech inherently involves choices of what to say and what to leave unsaid." *Hurley*, 515 U.S. at 573 (quotation omitted) (emphasis in original).

The government infringes the right not to speak where it commandeers a speaker's resources to disseminate the government's message. By commandeering Respondents' recruitment programs to disseminate the recruitment messages of military employers, the Solomon Amendment infringes Respondent's right not to speak. Such infringement is that much plainer where the commandeered resources are essentially communicative, as in this case.

In *Wooley*, this Court held that the State of New Hampshire could not enforce a law requiring automobile

drivers to display the State's motto on their license plates. *Wooley*, 430 U.S. at 717. The Maynards objected to the State's message on moral, religious, and political grounds. This Court recognized that the law "in effect require[d] that [the Maynards] use their private property as a mobile billboard for the State's ideological message or suffer a penalty," *id* at 715. This Court then held that the State could not "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. Placing *Wooley* squarely in the line of cases following *Barnette*, this Court demonstrated the expansiveness of "the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Wooley turned solely on the fact that the government commandeered a speaker's resources – the Maynards' automobile – to disseminate the government's message – the State's motto. It was of no moment that an automobile, unlike a billboard, is not essentially communicative. It was enough that the State commandeered the automobile and transformed it into a type of billboard. Moreover, it was of no moment that the State's motto was not at odds with any message that the Maynards sought to disseminate. *Id.* at 717. Indeed, the Maynards did not seek to disseminate any message of their own; rather, they sought only to avoid disseminating the State's message.

Here, as in *Wooley*, the government has commandeered an unwilling speaker's resources – Respondents' recruitment programs – to disseminate the government's own recruitment messages. An important part of the government's message is that openly lesbian and gay students cannot serve in our nation's military. Compelling Respondents to assist in

disseminating that message is, without more, an abridgement of the right not to speak.[2]

Where the resources that the government seeks to commandeer are themselves communicative, the First Amendment violation is magnified, as this Court recognized in *Tornillo* when it held that the government may not compel the inclusion of a response to an editorial in a newspaper. *Tornillo*, 418 U.S. at 243, 258. In doing so, this Court recognized that the commandeering of a newspaper, an essentially communicative resource, engendered two concerns. Noting that "it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion," *id.* at 257, this Court recognized that the commandeering of an essentially communicative resource necessarily displaces speech that the resource could otherwise be used to communicate. This Court also recognized that the commandeering of an essentially communicative resource necessarily interferes with editorial control over speech that the resource is used to communicate. *Id.* at 258.

Hurley illustrates the same point. There, this Court held that the Commonwealth of Massachusetts could not enforce a law prohibiting sexual orientation discrimination in places of public accommodation against a parade organizer that sought to exclude a gay contingent identifying itself as such. *Hurley*, 515 U.S. at 559 ("Massachusetts may [not] require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey."). In doing so, this Court emphasized that a speaker does not shed First Amendment protection for lack of "a narrow, succinctly articulable message," or because the

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[2] Respondents need not show that such commandeering has exacted an additional cost. *See Pacific Gas & Elec. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 5-6 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

organizer of an expressive vehicle "is rather lenient in admitting participants . . . combin[es] multifarious voices, or . . . fail[s] to edit [its] themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70. Where a speaker seeks to exclude an unwanted message from its own communicative event, this Court is especially mindful of the principle that it is "the choice of [the] speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575.

> [L]ike a composer, the [parade organizer] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the [parade organizer's] eyes comports with what merits celebration on that day. Even if this view gives the [parade organizer] credit for a more considered judgment than it actively made, the [parade organizer] clearly decided to exclude a message it did not like from the communication that it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

Id. at 574.

Respondents' recruitment programs are inherently communicative. At their core, they consist of dialogue between employers and students – students seeking to persuade employers to make offers, and employers seeking to persuade students to think highly of them and to accept whatever offers they make – as well as Respondents' communications with employers and students that enable this dialogue. *See Amicus* Br. of Law Sch. Career Serv. Prof'ls, at 7-17. Although commercial speech enjoys less

constitutional protection than other speech, it is nevertheless constitutionally protected so long as it does not propose an illegal transaction. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *see also Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-89 (1973). Because the Solomon Amendment prohibits Respondents from excluding the recruitment messages of military employers from Respondents' own communicative events, it infringes Respondents' right not to speak. *See Hurley*, 515 U.S. at 581 ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others.").

Notably, even if the Solomon Amendment permits Respondents to express their viewpoint in an alternative way without fear of penalty,[3] the fact that it compels them to participate in the dissemination of a message at odds with their own message "begs the core question." *Tornillo*, 418 U.S. at 256 (recognizing that "compulsion to publish that which reason tells [a newspaper] should not be published is unconstitutional" even if the government does not "prevent[]

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[3] Because the Solomon Amendment mandates that Respondents provide military employers access to their campuses and their students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer," 10 U.S.C. § 983(b)(1), it is unclear whether Respondents may engage in such speech without fear of penalty. Regardless, the Solomon Amendment is not a content-neutral restriction on expression, and the availability of alternative channels of communication is material only where a time, place, manner, or other content-neutral restriction on expression is at issue. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 879-80 (1997).

the [newspaper] from saying anything [that] it wishe[s]") (quotations and footnote omitted).

As discussed above, *Wooley* resolved that "core question" by holding that the First Amendment bars the government from commandeering a speaker's resources to disseminate the government's own message. *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), does not overrule or limit *Wooley*. *Johanns* holds only that, as a general rule, compelled funding of government speech through targeted exactions, as through general taxes, does not raise constitutional concerns. *Id.* at 2062. The line demarcating the types of resources that the government may commandeer to disseminate its own messages continues to be drawn at funding.

Johanns' holding reflects the practical reality that the legislative branch could not meaningfully exercise its taxing powers if, as a general rule, the judicial branch permitted federal taxpayers to direct their taxes to fund only the dissemination of those government messages that they support. *See id.*; *see also id.* at 2066 (Thomas, J., concurring). Indeed, the government could not meaningfully function if this were so. As this Court has noted, "virtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers may object." *Federal Communications Comm'n v. League of Women Voters of Cal.*, 468 U.S. 364, 385 n.16 (1984) (citation omitted); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens."). Thus, "[i]t is for Congress to decide which expenditures will promote the general welfare," *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (citation omitted), and the constitutional guarantee of free

expression typically may not be invoked to limit the constitutional power to tax. *Cf. Hernandez v Commissioner of Internal Revenue*, 490 U.S. 680, 699-70 (1989) ("[E]ven a substantial burden [on the right of free exercise] would be justified by the broad public interest in maintaining a sound tax system, free of myriad exceptions flowing from a wide variety of religious beliefs . . . . [T]he tax system could not function if denominations were allowed to challenge the tax system on the ground that it operated in a manner that violates their religious belief . . . . This argument knows no limitation.") (quotations omitted).

Johanns is inapposite here because this case does not involve compelled funding of government speech. The government has levied no tax on Respondents as a means of compelling them to participate in the dissemination of the recruitment messages of military employers. Rather, it has commandeered Respondents' recruitment programs as a means of doing so. Moreover, unlike the special assessment on beef producers in *Johanns*, which purported to benefit all beef producers by funding advertisements promoting the beef industry, the Solomon Amendment does not purport to benefit Respondents in any way.

Even in the context of a taxing scheme, this Court acknowledged in *Johanns* that "[t]here might be a valid [First Amendment] objection if those singled out to pay the tax are closely linked with the expression in a way that makes them appear to endorse the government message." *Johanns*, 125 S. Ct. at 2065 n.8 (quotation omitted). This acknowledgement implicitly recognized that the First Amendment stakes increase where the government compels a private organization or individual to participate in the dissemination of the government's message, and there is a plausible risk that the government's message will be misattributed to the private organization or individual who is compelled to participate in its dissemination. *See Hurley*,

515 U.S. at 575-77; *Pacific Gas*, 475 U.S. at 15-17; *but see id.* at 21 (Burger, C.J., concurring) (declining to endorse such reasoning). Accordingly, Respondents' claim that their right not to speak has been infringed is only strengthened by the fact that the Solomon Amendment may induce them to speak where they otherwise might not have done so[4] in order to disassociate themselves from the recruitment messages of military employers, especially given their long history of requiring participating employers to certify that they do not maintain discriminatory employment policies. *See Pacific Gas*, 475 U.S. at 15-16 ("[The] pressure to respond is particularly apparent when the owner has taken a position opposed to the view being expressed on his property.") (quotation omitted).

Respondents, however, need not establish a risk of misattribution to establish an infringement of their right not to speak. *See Wooley*, 430 U.S. 705. In this way, the analysis of the right not to speak diverges from the analysis of the right of expressive association, under which a showing of risk of misattribution or of impeding a chosen message may be critical to establishing a First Amendment violation in some circumstances. The right of expressive association is infringed where the government compels an expressive association to associate with a third party in such a manner that the presence of the third party threatens in a significant way the ability of the expressive association effectively to shape or communicate its views. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). This risk of obfuscating or nullifying an intended message is often a critical inquiry where the right of expressive association is concerned. *See Dale*, 530 U.S. at 653-54 (concluding that the presence in the Boy Scouts of James Dale, who was a visible and active proponent of gay rights and a community leader, sent a

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[4] *But see* n.3 *supra*.

message of acceptance that was contrary to the Boy Scouts' views regarding "homosexual conduct").

In short, *Johanns* does not change the legal analysis applicable to this case. Indeed, *Johanns* took pains to distinguish compelled funding of government speech from compelled participation in the dissemination of government speech. *Johanns*, 125 S. Ct. at 2060 (distinguishing *Wooley*); *id.* at 2066 (Thomas, J., concurring) (same). *Johanns* serves only to reaffirm the principle that the government may not compel a speaker to participate in the dissemination of speech, including government speech.[5]

C. The Solomon Amendment Penalizes Respondents Based on Their Viewpoint That Military Employers Should Not Be as Highly Regarded as Other Employers Because of Their Discriminatory Employment Policies

By regulating the way in which Respondents administer their recruitment programs, the Solomon Amendment not only regulates speech but does so in a viewpoint discriminatory manner. Viewpoint discrimination by the government is anathema to the constitutional guarantee of free expression. Because "[t]here is an equality of status in the field of ideas," it is presumed that government action "must afford all points of view an equal opportunity to be heard." *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (quotation and footnote omitted). Accordingly, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for

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[5] Although the government presumptively cannot insist that its viewpoint be included in a private forum, private organizations and individuals presumptively can insist that their viewpoints be included in a public forum. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Healy v. James*, 408 U.S. 169 (1972).

the restriction." *Rosenberger*, 515 U.S. at 829 (citation omitted); *see also Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (citations omitted).

The Solomon Amendment does not apply to universities that seek to exclude military employers from their recruitment programs based on "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2); *cf. Gillette v. United States*, 401 U.S. 437, 461 n.23 (1971) (noting that any accommodation of conscientious objectors is not constitutionally mandated). Thus, the Solomon Amendment distinguishes between universities that seek to express their disapproval of military employers because of their martial policies, and those that seek to express their disapproval of military employers for other reasons, including their employment policies.

In addition, the Solomon Amendment singles out a class of speakers – military employers – and privileges its speech by empowering military employers to force their way into the communications between employers and students that lie at the core of Respondents' recruitment programs. Whether characterized as discrimination based on type of speaker or discrimination based on point of view, the government may no more favor the views of military employers as a class than it may favor the views of labor picketers as a class, *Mosley*, 408 U.S. at 94 (impermissible content discrimination), or disfavor the views of religious publications as a class, *Rosenberger*, 515 U.S. at 831 (impermissible viewpoint discrimination).

The legislative history of the Solomon Amendment makes clear that it was enacted to retaliate against law schools for expressing disapproval of the discriminatory employment policies of military employers. *See Cornelius v.*

NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 811 (1985) ("The existence of reasonable grounds . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination.") (citations omitted). As described by one bill sponsor, the purpose was to "put [institutions of higher education] on notice that their policies of ambivalence or hostility towards our Nation's armed services do not go unnoticed." Using one campus as an example, the sponsor said the school's ban was adopted "because a vocal minority at the university disagreed with military personnel standards." "These colleges and universities," he went on, "need to know that "their starry-eyed idealism comes with a price. If they are too good – or too righteous – to treat our Nation's military with the respect it deserves . . . or to afford our military the same recruiting opportunities offered to private corporations – then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America." 140 Cong. Rec. H3860-03 (1994). Because its legislative history reflects a desire to penalize the expression of a viewpoint, the Solomon Amendment furthers an interest "so plainly illegitimate that [it] . . . immediately invalidate[s] the [law]." *Vincent*, 466 U.S. at 804; *see also Velazquez*, 531 U.S. at 548-49 ("[E]ven Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.") (citations omitted).[6]

As a viewpoint-based enactment, the Solomon Amendment does not merit the more deferential analysis

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[6] By contrast, a university's decision to enforce a neutral nondiscrimination policy does not constitute viewpoint discrimination (even assuming the inquiry is limited to public universities subject to the First Amendment) because, as this Court has repeatedly recognized, laws prohibiting acts of discrimination are not "...aim[ed] at the suppression of speech...." *Roberts v United States Jaycees*, 468 U.S. 609, 623-24 (1984).

applied to regulation of conduct. In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court held that, "when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376 (quotations omitted). The governmental interest, however, must be "unrelated to the suppression of free expression." *Id.* at 377. A governmental interest in the suppression of a particular viewpoint, by contrast, triggers strict scrutiny.

Texas v. Johnson, 491 U.S. 397 (1989), is illustrative. In *Johnson*, this Court overturned a criminal conviction for flag desecration. In doing so, this Court recognized that the government may not "proscribe particular conduct *because* it has expressive elements." *Id.* at 406 (emphasis in original).

> If the [criminal prohibition] is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether [the proffered] interest justifies [the] conviction under a more demanding standard.

Id. at 403 (citations and footnote omitted).

Johnson's assessment of whether the criminal prohibition on flag desecration was intended to suppress expression is especially instructive. The State proffered an interest in "preventing breaches of the peace," *id.* at 407, an interest that this Court presumed to be unrelated to the suppression of expression, *id.* at 408 n.4. This Court, however, insisted that the proffered interest be "implicated on [the] facts." *Id.* at 404. Finding no "evidence offered by the State" in support of the proffered interest, *id.* at 408, this Court

concluded that "the State's interest in maintaining order [was] not implicated on [the] facts," *id.* at 410. *Cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 442 (2002) ("[O]ur cases require . . . that municipalities rely upon evidence that is reasonably believed to be relevant to the secondary effects that they seek to address.") (quotation omitted); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977) ("[R]espondents have not demonstrated that the place or manner of the speech produces a detrimental secondary effect on society.") (quotation omitted).

The State also proffered an interest in "preserving the flag as a symbol of nationhood and national unity," *Johnson*, 491 U.S. at 407, an interest that this Court held was related to the suppression of expression, *id.* at 410. Indeed, this Court characterized the interest as one in suppressing a particular viewpoint:

> [T]he State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if [the State] means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint.

Id. at 413 n.9 (emphasis in original).

Accordingly, this Court concluded that the criminal prohibition on flag desecration was not justified by any interest unrelated to suppression of expression.

The Solomon Amendment is similarly flawed. Like the State's reliance on potential disruptions of the peace in *Johnson*, the government's assertion that the Solomon Amendment was intended to promote military readiness is

unsupported by the record, which, by contrast, starkly illuminates the government's retaliatory interest in penalizing universities that disagree with the military's "don't ask, don't tell" policy. *See* § D, *infra*.

"The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (quotation and citation omitted). By impermissibly penalizing Respondents based on their viewpoint that military employers should not be as highly regarded as other employers because of their discriminatory employment policies, the Solomon Amendment thwarts this purpose of the First Amendment.

D. The Record Does Not Show That the Solomon Amendment Has a Constitutionally Sufficient Justification

Whether viewed as compelled speech or viewpoint discrimination, the Solomon Amendment cannot be upheld unless it satisfies strict scrutiny. On this record, it clearly does not and therefore the grant of preliminary injunctive relief was appropriate. Indeed, the government did not introduce *any* evidence below that would permit this Court to conclude that the government has met its burden of establishing that the Solomon Amendment furthers a compelling interest by the least restrictive means.[7] Moreover,

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[7] While there are a few conclusory assertions in the legislative history of the Solomon Amendment suggesting that military readiness is furthered by access to recruitment programs, *see, e.g.*, 142 Cong. Rec. H5674-03

it is not enough for the government to establish that military readiness is a compelling government interest; the government must also establish that the Solomon Amendment in fact furthers military readiness, and does so by the least restrictive means.

In *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622 (1994), this Court held that federal statutory provisions requiring cable television systems to carry broadcast television signals were subject to intermediate scrutiny, *id.* at 661-62, and that the proffered government interests were important ones, *id.* at 662-64.[8] Nevertheless, given the "paucity of evidence" addressing the relationship between the law at issue and the proffered government interests, *id.* at 667-68, a plurality of this Court concluded that, "[o]n the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied [the requisite] inquiry," *id.* at 665.[9]

The reasoning in *Turner* applies equally in this case:

> That the Government's asserted interests are important in the abstract does not mean . . .

(1996), those conclusory assertions were neither supported by data nor specific to the *law school* recruitment programs that are at issue here.

[8] *Turner* was an intermediate scrutiny case. Its insistence on factual support for the government's asserted interests applies *a fortiori* where strict scrutiny applies.

[9] In *Turner*, this Court remanded with instructions to develop the record. *Id.* at 668. Because *Turner* was an appeal following the entry of summary judgment for the government, *id.* at 626-27, the government would not otherwise have had another opportunity to develop the record before final disposition of the case. In this case, this Court need not do likewise. Because this case is an interlocutory appeal following from the grant of preliminary relief for Respondents, the government will have another opportunity to develop the record before final disposition of the case.

> that [the law at issue] will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Id. at 664 (quotation and citations omitted).

Any argument that the Solomon Amendment was motivated by concerns about military readiness is further undermined by the fact that the Solomon Amendment accommodates the viewpoint of universities that seek to exclude military employers from their recruitment programs for a reason other than disapproval of their discriminatory employment policies, as discussed above. *See* 10 U.S.C. § 983(c)(2). Even if the government had proffered some support for its military readiness rationale, which it has not, such exemptions "diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

Accordingly, on this record, this Court must conclude that the Solomon Amendment lacks a constitutionally sufficient justification.

CONCLUSION

Amici respectfully submit that this Court should affirm that the Solomon Amendment constitutes an unconstitutional condition in violation of the right to free expression, and hold that it impermissibly compels speakers to participate in the dissemination of a message and it impermissibly penalizes speakers based on their viewpoint.

Respectfully submitted,

Kenneth Y. Choe
(*Counsel of Record*)
Steven R. Shapiro
Matthew A. Coles
James D. Esseks
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
125 Broad Street
New York, NY 10004
Phone: (212) 549-2500

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Supreme Court of the United States

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC
AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE ASSOCIATION OF AMERICAN LAW SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PAUL M. SMITH*
WILLIAM M. HOHENGARTEN
DANIEL MACH
KATHLEEN R. HARTNETT
AYODELE T. CARROO
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

September 21, 2005

**Counsel of Record*

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Law Schools, Inc. (AALS) is a non-profit educational organization that has as its purpose "the improvement of the legal profession through legal education." AALS Bylaw 1-2. Formed in 1900, AALS serves the legal community as a learned society of law teachers and is legal education's principal representative to the federal government and to other higher education organizations and learned societies. AALS membership standards require, *inter alia*, that member schools pursue policies that ensure their students equal opportunity and nondiscrimination on the basis of sexual orientation. Of the 188 law schools accredited by the American Bar Association in this country, 166 currently meet AALS standards of membership and are AALS members.

Only rarely does the AALS seek to become involved in litigation as *amicus curiae*, and then only in matters involving issues with far-reaching impact on fundamental aspects of legal education. The issue presented in this case is, without question, such an issue. AALS is deeply troubled by the provisions of federal law challenged here, which conflict with the core values of AALS policy and the nondiscrimination obligations of AALS member law schools. AALS also has a strong interest in the correct description and interpretation of AALS policies, including the "amelioration policy" that has been the subject of much discussion in this litigation. In particular, AALS seeks to

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

make clear that its amelioration policy is not an adequate substitute, either factually or as a legal matter, for a true nondiscrimination requirement.

STATEMENT

1. Law schools play a vital role in ensuring that students not only learn the law but also appreciate and pursue fairness and social justice. Indeed, a "core value" shared by AALS and its member law schools is a "devot[ion] to fostering justice and public service in the legal community." AALS Bylaw 6-1(b)(i). Thus, an 1874 description of the broad law school mission remains quite apt: "a law school is not simply the place for training students '"to plead causes, to give advice to clients, to defend criminals,'" but '"the place of instruction in all sound learning relating to the foundations of justice.'" J.A. 66 (quoting then-President Woolsey of Yale Law School). Put simply, '"[l]aw and justice are meant to go together.'" J.A. 194 (quoting statement of Richard Matasar, Dean and President of New York Law School).

In furtherance of this broad mission to promote free thought and inculcate principles of justice, law schools across the country have sought to create supportive, inclusive, and tolerant learning environments for their students. In particular, AALS and its member law schools have long believed that discrimination is antithetical to their mission, and have expressed and enforced principles of nondiscrimination in all aspects of the law school experience. As part of this effort to eliminate discrimination in legal education, AALS has required its members to avoid discrimination on the basis of race or color since 1951, and on the basis of sex since 1970.

The AALS nondiscrimination policy is based on a deeply held view that "an environment sufficiently conducive to

teaching and learning is not possible if harmful, irrational discrimination is supported or condoned by the school." J.A. 211-12. Rather, "[i]t is only by the free expression of ideals and beliefs from individuals with a variety of viewpoints and personal experiences that the . . . goal of teaching the law can be achieved." J.A. 54; *see* J.A. 32, 67, 136, 195-96, 213, 227-30. As the district court aptly explained, law schools' nondiscrimination policies "serve both pedagogical and instrumental purposes by teaching values students would not otherwise learn from case books and by fostering an environment of free and open discourse." Pet. App. 95a. Far from shutting out points of view, enforcing a nondiscrimination policy actually creates an environment in which competing views can develop. *See, e.g.*, J.A. 228-30.

AALS and its member schools not only prohibit discrimination by the schools themselves, but also seek "to ensure that each and every student ha[s] the opportunity to be considered on their merits by each and every employer" using the schools' career services offices. J.A. 58. Thus, it is AALS policy that "[a] member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation." AALS Bylaw 6-3(b). AALS and its members seek to ensure a nondiscriminatory recruiting process because "abetting a discriminatory employer's recruiting efforts undermines the values" that AALS member seek to promote. J.A. 196; *accord, e.g.*, J.A. 57-58 ("The Law School was not merely interested in conveying the message that it did not believe in discrimination; it also wished to convey the message that it would not tolerate discrimination and would not be seen to tolerate it expressly or implicitly."). As one law school official has explained, in representative reasoning, nondiscrimination in recruiting is "integral to . . .

equality of opportunity and critical inquiry," because "[a]nyone on campus who discriminates in ways that the Law School considers invidious strikes at heart of [the School's] values," and "threatens to shatter the setting of openness and sensitivity that the Law School strives so hard to cultivate." J.A. 69; *see, e.g.*, J.A. 212-13, 230-31.

2. In the late 1970s, law schools began to add sexual orientation to the list of prohibited categories of discrimination. *See, e.g.*, J.A. 69-72 (Yale); J.A. at 150-51 (New York University). Reflecting this emerging trend, the AALS House of Representatives voted unanimously to amend the AALS Bylaws in 1990 to include sexual orientation in the nondiscrimination policy. That policy, codified as AALS Bylaw 6-3(b), now provides in relevant part:

> A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, *or sexual orientation*. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity.

AALS Bylaw 6-3(b) (emphasis added).

Further, the AALS Executive Committee Regulations implement Bylaw 6-3(b) in the following language:

> A member school shall inform employers of its obligation under Bylaw 6-3(b), and shall require

> employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-3(b).... A member school has an obligation to investigate any complaints concerning discriminatory practices against its students to assure that placement assistance and facilities are made available only to employers whose practices are consistent with the principles of equal opportunity stated in Bylaw 6-3(b).

AALS Executive Committee Regulation 6-3.2. By the end of 1990, all AALS members – more than 160 law schools at the time – had adopted nondiscrimination recruiting policies covering sexual orientation.

These schools rejected the view – which the government continues to hold today, *see* U.S. Br. at 6-7 – that "sexual orientation discrimination was not as serious a matter as sex or race discrimination." J.A. 70. Rather, as these schools recognized, gay, lesbian, and bisexual students largely felt compelled to hide their sexuality based on the widely held perception "that you could not have a successful legal career if you were professionally open about your minority sexual orientation." J.A. 68. As Professor William Eskridge – now a leading scholar on sexuality and the law – recollects about his time at Yale Law School in the 1970s, just prior to Yale's extension of nondiscrimination to sexual orientation:

> As a closeted gay student, I assumed that being secretive about one's sexual orientation was part of the nature of things and that neither the law nor our professors offered us any hope for more dignified treatment. I was resigned to this reality, but several

> of my student colleagues were not. Their activism proved to be a transforming event in the history of the Yale Law School and in my own life.

J.A. 68-69. Thus, "[t]he point" of extending nondiscrimination policies to include sexual orientation was the harm suffered by gay students from the "necessity of concealment of homosexuality, and consequences of such concealment." J.A. 71.

The effect of AALS members' decision to outlaw discrimination based on sexual orientation cannot be overstated. As Professor Eskridge explains, Yale's 1978 policy decision – the decision ultimately reached by *all* AALS members – was perceived by lesbian, gay, and bisexual students "as a signal that they were accepted as equal members, perhaps for the first time, by the Law School community." J.A. 71. Moreover, this policy started Yale down the path of being "a center for fact-based and critical thinking about issues of sexuality, gender, and the law." J.A. 72. Indeed, as Professor Eskridge points out, the work of Yale professors and students informed much of the open legal debate that surrounded this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* J.A. 73-74. In sum, Yale's experience shows that a law school's "welcoming attitude . . . to sexual and gender minorities" has a "direct payoff in the intellectual life of the Law School," as well as "an influence beyond" school walls. J.A. 72.

3. In various forms over the years, the United States Armed Forces have imposed a ban on lesbian, gay and bisexual service members. *See* 10 U.S.C. § 654. Thus, the military generally could not offer "an assurance of the employer's willingness to observe the principles of equal opportunity stated" in the AALS Bylaws. AALS Executive

Committee Regulation 6-3.2. As a result, AALS member schools prohibited or restricted military on-campus recruiting in various ways throughout the 1980s and early 1990s. *See* J.A. 35, 78-81, 215.

In light of this on-campus resistance, but notwithstanding the apparent absence of any adverse impact on military recruiting, Congress in 1994 passed the first version of the so-called "Solomon Amendment," named for former Representative Gerald Solomon. The 1994 version of the Solomon Amendment denied Department of Defense funds "to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campuses or access to students on campuses." National Defense Authorization Act for Fiscal Year 1995, § 558, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

As the district court explained, "[t]he apparent impetus for the Solomon Amendment was the continued refusal of many educational institutions to allow the military to engage in on-campus recruiting," Pet. App. 91a – not a crisis in military recruiting. Indeed, the Department of Defense did not support passage of the Amendment in 1994, viewing it as "'unnecessary, duplicative, and potentially harmful to defense research initiatives.'" *Id.* at 92a n.2 (quoting 140 Cong. Rec. H3863 (1994) (Rep. Underwood)).

Although the Amendment's supporters cited the military's recruiting needs as a justification, Representative Solomon made clear the symbolic nature of the legislation, urging his colleagues to support the legislation and thereby

> tell[] recipients of F[e]deral money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is

> your first-amendment rights. But do not expect Federal Dollars to support your interference with our military recruiters.

Pet. App. 91a n.2 (quoting 140 Cong. Rec. H3861 (1994)). Co-sponsor Representative Pombo similarly made clear that the point of the Amendment was to "'send a message over the wall of the ivory tower of higher education,'" to combat the "'growing, and misguided, sense of moral superiority.'" *Id.* at 91a n.2 (quoting 140 Cong. Rec. H3863 (1994)).

4. In its initial iteration, the Solomon Amendment had little effect on law schools because it restricted only federal funds provided through the Department of Defense, a grant source largely irrelevant to law schools. Thus, addressing the Solomon Amendment in 1996, AALS reaffirmed its policy against discrimination in the recruiting process, stating that, with respect to military recruiters, "[m]ember schools should not . . . schedule on-campus interviews, assist in scheduling interviews, include military job opportunities in lists of employers who solicit resumes, or forward law students' resumes to such employers." AALS Memorandum 96-15, May 28, 1996, at 5. AALS made clear the danger of compromising its nondiscrimination principles: "The fundamental policy concerning discrimination . . . would be seriously undermined if those nondiscrimination principles were abandoned when law students seek employment in the legal profession," and would "work[] a palpable injury to those students." *Id.* at 2. It was thus only in the limited context of a conflicting demand from a "higher authority" – state law or a school's parent university – that the AALS contemplated potential law school noncompliance and amelioration measures. *See id.* at 5-6.

Soon after the Solomon Amendment was first passed, however, Congress amended the law to restrict funds not only from the Department of Defense, but also from the Departments of Labor, Health and Human Services, Education, and related agencies. Omnibus Consolidated Appropriation Act, 1997, § 514(b), Pub. L. No. 104-208, 110 Stat. 3009-271 (1996). Because the revised Amendment threatened to deprive AALS member schools of millions of dollars in federal funding, the AALS Executive Committee was forced to address the conflict between the Amendment and the AALS nondiscrimination policy. *See* J.A. 253-55 (excerpts from AALS Memorandum 97-46, Aug. 13, 1997).

Ultimately, AALS Executive Director Carl Monk advised member schools of a new AALS "amelioration" policy – a policy that continues to this day:

> [S]o long as the Solomon Amendment remains in effect in its current form, each member school will be free to choose whether to continue to comply with the [AALS] bylaw requirements as it applies to the military. Schools that choose not to comply will have their noncompliance excused so long as they engage in appropriate activities to ameliorate the negative effects that granting access to the military has on the quality of the learning environment for its students, particularly its gay and lesbian students.

J.A. 253-54. The Monk memorandum offered several examples of ameliorative steps, including: informing students that the military discriminates in a manner that violates the school's established policy, and that the school would lose valuable federal funds if it barred military recruiters; hosting forums for the discussion of military policy, or, more generally, sexual-orientation based

discrimination; and encouraging and promoting the presence of active lesbian and gay student organizations and the presence of openly gay faculty and staff. J.A. 254.

Although AALS viewed amelioration as the only realistic option in light of the severe consequences of the amended Solomon Amendment, the AALS amelioration policy is not – and never will be – an adequate substitute for its preferred policy of nondiscrimination. This is so because, simply stated, amelioration still permits law schools to facilitate discrimination based on sexual orientation. As the policy's name suggests, it attempts merely to *ameliorate* the negative consequences of a law school "failing to provide an environment that adequately protects its students from the experience of discrimination." J.A. 253.

That amelioration is not the preferred policy of AALS and its members is evident from the AALS response to subsequent changes in the Solomon Amendment and its implementing regulations. For example, in 1999, Congress removed student aid funds from the ambit of the Solomon Amendment. Department of Defense Appropriations Act of 2000, § 8120, Pub. L. No. 106-97, 113 Stat. 1212, 1260 (1999). Because fewer than five AALS members received funding that might be affected by the remaining statute, AALS subsequently determined that noncompliance with the nondiscrimination mandate would no longer be excused. *See* AALS Memorandum 00-2, Jan. 24, 2000, at 1-2. A week after that action, however, the Department of Defense issued interim regulations that threatened to deny *all* federal funds to a law school's *parent* university, even if only the law school (or another "subelement" of the university) actually barred military recruiters. *See* 65 Fed. Reg. 2056 (2000). In light of the severe threat posed by these regulations, the

AALS reinstated its fallback amelioration policy. *See* AALS Memorandum 00-6, Feb. 9, 2000.

5. Because of the increasingly harsh threatened consequences of violation of the Solomon Amendment since 1997, as well as the creation of the AALS amelioration policy, AALS member law schools began permitting military recruiters on campus to varying degrees starting in 1997 – albeit with great reluctance. These schools also undertook a variety of amelioration measures, as required by the AALS.

But as the record makes clear, although the AALS amelioration policy helps to soften the blow of coerced discrimination on law school campuses, it is no substitute for a fully enforced nondiscrimination policy and the expressive power such a policy conveys. *See, e.g.*, J.A. 165 ("Despite devoting considerable effort to amelioration, the adverse effects of allowing discriminatory recruiters to participate in on-campus recruiting events cannot be cured."). As one dean stated in informing the law school community that military recruiters would be permitted to use the career services office facilities: "For many of us, a policy of non-discrimination on the basis of sexual orientation reflects a fundamental moral value," and thus a great deal of "pain will result from this action" – regardless of the existence of ameliorative measures. J.A. 44; *accord* J.A. 141. Faculty members at another law school detailed this pain, explaining that allowing military recruiters to co-opt the law school's facilities "conscripts us into complicity with policies that unjustly degrade fellow persons." J.A. 172.

For their part, many gay, lesbian and bisexual students felt "betrayed" by their schools' capitulation, and suffered from "disillusionment at the notion that their school would cooperate with the suppression of their opportunity to

express themselves fully and to avail themselves of all the rights and privileges afforded to their straight peers." J.A. 212; *see, e.g.*, J.A. 40-41, 141-44, 163-64, 201, 207-09, 231-32, 240-43. Amelioration provided cold comfort at best, as these students, "[i]nstead of feeling the safety promised by the commitment to acceptance, diversity, and the prohibition of sexual orientation discrimination, . . . felt the danger of the instability of those guarantees." J.A. 213.

6. Although nearly all law schools bent to the government pressure at some point after 1997, they did not initially provide the military exact parity to other recruiters. Rather, as the version of the Solomon Amendment in force through 2005 required, law schools provided "entry to campuses or access to students on campuses." National Defense Authorization Act for Fiscal Year 1995, § 558, Pub. L. No. 103-337, 108 Stat. 2663 (1994). Thus, many schools permitted the military recruiters to reserve rooms on campus and obtain mailing lists for students, but would not affirmatively assist military recruiters via career service office channels. *See, e.g.*, J.A. 59-60, 84, 137-38, 154-56, 180-81, 218-19. During this period, military recruiters expressed satisfaction with these measures, which – although not the same treatment given to other recruiters – granted the military access to campuses and students as the statute required. *See, e.g.*, J.A. 60, 156, 161.

Nevertheless, law schools' compliance with the letter of the Solomon Amendment was not enough for the military and Congress. In December of 2001, the military sent letters to a targeted group of law schools to insist that they treat military recruiters equally to other recruiters in all respects. *See* J.A. 61-62, 83-90, 139, 161, 192, 198, 220-21.

Yale Law School's experience tellingly demonstrates that this recent insistence on complete equality for the military is grounded in symbolism, not need. *See* J.A. 82-92, 107-33. Yale had consistently permitted military recruiters to meet students on campus and had provided the recruiters with access to student contact information, but had not permitted them to participate in the school-sponsored off-campus interview program. *See* J.A. 82-84. When the military threatened to take action against Yale for this disparate treatment during 2001 and 2002, Yale University's president eventually bent to the military's pressure and offered full on-campus access, including personnel to schedule interviews. *See* J.A. 88-89, 120-22. But the military rejected this proposal because the Yale personnel involved were from Yale *College*, not Yale *Law School*. *See* J.A. 91, 128-33. When Yale finally relented to the military's insistence on participating in the law school program, three branches of the military sent JAG recruiters to sit in empty interview rooms at Yale, knowing full well that not a single student had expressed interest in interviewing. *See* J.A. 90.

Other law schools' experience similarly shows that the military's recent insistence on complete equality stems from a desire to suppress the law schools' message – not actual need. For instance, since 1997, USC Law School permitted military recruiters to interview on-campus and provided them with numerous other services, but did not allow them to participate in the school-sponsored off-campus interview program. *See* J.A. 59-60. Although the Chief Judge Advocate initially *thanked* USC for these accommodations, *see* J.A. 60, the military claimed in 2002 that USC was in violation of the Solomon Amendment for failing to treat the military identically to other recruiters, *see* J.A. 61, and warned USC that the military no longer "'want[ed] to play

games' with the law schools," J.A. 63. The military similarly threatened Harvard Law School for allowing on-campus military recruiting (but without Harvard personnel to arrange the interviews), *see* J.A. 137-38, and Boston College Law School for allowing on-campus military recruiting (but placing military recruiting literature in the library rather than the career services office), *see* J.A. 219-20.

Thus, the court of appeals was correct to conclude that "it was in apparent response to the law schools' ameliorative measures – their efforts to 'distance themselves' (in the District Court's words) from the military's position – that the DOD and eventually Congress insisted on equal treatment for military recruiters." Pet. App. 36a. That symbolism – not need – underlies the government's increasingly strict view of the Solomon Amendment is exemplified by the remarks of the Deputy Undersecretary of Defense to the President of Yale University, in an extensive letter setting forth the Defense Department's 2003 ultimatum: "[B]y singling out military recruiters, Yale sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs." J.A. 132. Similarly, the government's lack of need is made clear by its failure to submit *any* evidence in this case to support its claims of need. *See* Pet. App. 2a n.2.

7. In 2004, while this litigation was pending, Congress amended the Solomon Amendment to formalize what had been the Department of Defense's informal policy of demanding complete parity. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, § 552, Pub. L. No. 108-375, 118 Stat. 1811, 1911 (2004). The Solomon Amendment now withdraws federal funding to *all* parts of any university if a "subelement" of that

university – such as a law school – does not affirmatively assist military recruiters in providing access to campus and students "in a manner that is at least equal in quality and scope to the access . . . that is provided to any other employer." 10 U.S.C. § 983(b)(1). As with the previous iterations of the Solomon Amendment, Congress neither considered nor cited any actual evidence that military recruiting would be jeopardized absent this more restrictive regime. Rather, legislators relied on one Defense Department official's feelings that on-campus "intransigence and opposition" was "intolerable," particularly "now, at a time when our nation is at war." H.R. Rep. No. 108-443(I), at 7 (2004) (letter of Under Secretary of Defense for Personal Readiness to House Armed Services Committee).

SUMMARY OF ARGUMENT

As AALS and its members have long stated and believed, law schools must not only provide tangible assets to create an optimal educational environment, but must also provide a supportive, nurturing, and positive learning atmosphere, in which students and professors can feel free to interact without fear of discrimination. To this end, AALS requires as a condition of membership that schools make available their job-placement facilities and resources only to prospective employers who do not discriminate in hiring. Providing a nondiscriminatory environment lies at the heart of the law school mission for the 166 AALS members, all of whom have a strong interest in conveying their message that discrimination in the law school community is unacceptable.

Because the military openly discriminates in employment on the basis of sexual orientation – one of the types of invidious discrimination prohibited by AALS policy for well over a decade – the Solomon Amendment presents AALS

members with a Hobson's choice: Either the university must forsake millions of dollars of federal funds largely unrelated to the law school, or the law school must abandon its commitment to fight discrimination, in direct violation of AALS policy. By coercing law schools into providing equal access and assistance to military recruiters and restricting their core message of nondiscrimination, the Solomon Amendment violates the expressive and associational rights of AALS members.

Despite the government's present claims, the Solomon Amendment – particularly, its recent, more severe iterations – was not enacted to address an actual crisis in military on-campus recruiting. Rather, as the government's statements and conduct have made clear, this policy was "aimed at the suppression of ideas," U.S. Br. at 15 – namely, the perceived sentiment of AALS member schools "that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations" that participate in on-campus recruiting. J.A. 132. Thus, despite that law schools have accommodated military recruiters through various arrangements, the military has been unsatisfied with anything short of completely equal treatment – and the message that such equal treatment sends.

To minimize the damage inflicted on law school communities by the Solomon Amendment, AALS adopted an "amelioration policy" in 1997. This policy excused member schools from complying with the standard AALS policy on nondiscrimination in job recruiting, so long as schools took certain ameliorative steps to help restore an atmosphere of tolerance and respect on campus despite the presence of discriminatory recruiters. But the amelioration policy was not – and was never intended to be – a substitute for the nondiscrimination policy of AALS or its members.

Rather, AALS considers amelioration to be a far inferior alternative means for law schools to disseminate their message of nondiscrimination. Under the First Amendment, it is the prerogative of the AALS and its member schools – and not the United States government – to determine how best to express the nondiscrimination principles in which these schools so strongly believe.

ARGUMENT

I. THE SOLOMON AMENDMENT VIOLATES LAW SCHOOLS' FIRST AMENDMENT RIGHTS.

The Solomon Amendment violates at least two First Amendment rights of law schools – the right of expressive association and right to be free from compelled speech.

A. The Solomon Amendment Violates Law Schools' Right of Expressive Association.

The court of appeals properly recognized that law schools "qualify as expressive associations" entitled to constitutional protection. Pet. App. 16a; *accord id.* at 144a (district court opinion). In addition to training students in the law, AALS member schools are committed to inculcating values and principles of justice in their students and to "foster[ing] devotion to professional ideals" though word and deed. J.A. 195 (quotation marks omitted); *see supra* pp. 2-6. As this Court recognized in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), it is "indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Id.* at 650; *see also, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop

good morals, reverence, patriotism, and a desire for self-improvement").

AALS and its members schools have long believed that discrimination contravenes their educational mission of inculcating principles of justice, and endangers the inclusive learning environment necessary to teach those principles effectively. *See, e.g.*, J.A. 211-12. Law schools thus have expressed and enforced principles of nondiscrimination in all aspects of the law school experience – including recruiting by prospective employers. *See supra* pp. 2-6.

The enactment and enforcement of nondiscriminatory recruiting policies are therefore integral to AALS member law schools' expressive mission. By denying access to recruiters that discriminate, a law school gives substance to the pedagogical message that bigotry and intolerance will not be permitted on campus, and demonstrates that the school will not discriminate or abet others that do. These nondiscrimination policies allow law schools to expressly "communicat[e] through word and deed" the "values of equal participation and non-discrimination that are critical to the educational mission." J.A. 195; *see supra* pp. 3-4.

The nature and sincerity of the law schools' nondiscrimination message is undisputed in this case. Indeed, the associational message protected in *Dale* was far less explicit than the nondiscrimination principle expressly and unequivocally conveyed in the policies of the AALS and its member schools. *See Dale*, 530 U.S. at 651-52 (deferring to the Boy Scouts' assertion that homosexual conduct was inconsistent with the values "embodied" in the Scout Oath and Law, even though the oath and the law did not expressly mention sexuality or sexual orientation); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,

515 U.S. 557, 562 (1995) (recognizing parade organizers' First Amendment right to exclude speakers, even though the organizers "had no written criteria and employed no particular procedures for admission" to parade).

The Solomon Amendment significantly impairs the law schools' expressive efforts by requiring federally funded schools to suspend their nondiscrimination policies, and not only permit, but facilitate, activities the schools actively seek to condemn. As AALS has explained to its members, "[t]he fundamental policy condemning discrimination with respect to the admission of applicants and the hiring of faculty and staff would be seriously undermined if those non-discrimination principles were abandoned when law students seek employment in the legal profession." AALS Memorandum 96-15, May 28, 1996, at 2. The faculty of AALS member schools similarly and overwhelmingly attest that "abetting a discriminatory employer's recruiting efforts undermines the values of the Law School," and significantly interferes "with the quality of the Law School's educational environment." J.A. 196, 213; *see also, e.g.*, J.A. 69.

The record clearly demonstrates the extent to which the Solomon Amendment has muddled the law schools' message of nondiscrimination. As students told a professor after their school made an exception to its nondiscrimination policy for the military, "the only message they could derive from abandonment of the Non-discrimination Policy was that the Law School was not really as serious about its commitments as promised." J.A. 212. Similar effects have been felt at the other law schools that have adopted amelioration policies, as pedagogical lessons about commitment to equality and justice only breed cynicism and generate feelings of betrayal and disillusionment, particularly among gay, lesbian, and bisexual students. *See* J.A. 212-13, 232, 260-61, 264-67.

As the record brings into sharp relief, a law school cannot effectively teach principles of equality and nondiscrimination when it affirmatively assists an employer that openly discriminates against individuals based upon their sexual orientation. J.A. 232. Indeed, the "Do as I say, not as I do" method has never proved to be an effective teaching model in any setting. However much a law school touts its commitment to tolerance and diversity, suspending its nondiscrimination policy and affirmatively assisting military recruiters significantly impairs the law school's "ability to disseminate" its nondiscrimination message. *Dale*, 530 U.S. at 654. Moreover, just as courts must "give deference to an association's assertions regarding the nature of its expression, [they] must also give deference to an association's view of what would impair its expression." *Id.* at 653; *see also, e.g., Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981). Thus, as in *Dale*, the Court should defer to the law schools' reasoned and experienced judgments about the ill effects of the Solomon Amendment on their associational expression.

The United States claims that *Dale* is inapplicable here because there is purportedly "no serious risk" that the military's policies "would be regarded by the school's students or faculty, or by the outside world, as reflecting the views of the school." Pet. at 13. As an initial matter, the United States has not supported this claim with any evidence, and the record suggests that the contrary is true, as students and faculty alike have understood the law schools' capitulation to demonstrate a lack of true commitment to their gay, lesbian, and bisexual students. *See* J.A. 212-13, 232, 260-61, 264-67. More important still, the government has erroneously assumed that attribution is a prerequisite to

establishing a violation of the right of expressive association. In *Dale*, for example, the Court did not require attribution for an expressive association claim; rather, the Court demanded only a showing that the forced inclusion of an unwanted member "significantly affect[s]" an association's "ability" to express its viewpoint. *Dale*, 530 U.S. at 650. As discussed above and as the record shows, there is no doubt that the Solomon Amendment has markedly affected AALS members' ability to express their nondiscrimination message.

The government has completely failed to justify this infringement on law schools' right of expressive association. The United States may well have a compelling interest in recruiting talented military lawyers, but the Solomon Amendment is not narrowly tailored to achieve that end. To the contrary, as the court of appeals explained, the Solomon Amendment could not have been drawn "more broadly." Pet. App. 23a. Moreover, no iteration of the Solomon Amendment – particularly not the recent version demanding absolute equality – has been animated by any evidence of a crisis in military recruiting. Indeed, the government has failed to offer *any* evidence in this case to substantiate its claimed needs. *See id.* at 2a n.2. This glaring absence of evidence exposes what has been true of the Solomon Amendment since its adoption in 1994 – that it is symbolic legislation aimed at the suppression of ideas.

For example, although the Solomon Amendment's initial supporters cited military recruiting needs as a justification, the military had no difficulty recruiting qualified lawyers prior to 1994. Rather, as made clear by Representative Pombo, co-sponsor of the law, the point of the Amendment was to "'send a message over the wall of the ivory tower of higher education,'" to combat the "'growing, and misguided, sense of moral superiority.'" Pet. App. 91a n.2 (quoting 140

Cong. Rec. H3863 (1994)). As Representative Pombo put it, colleges and universities must "know that their starry-eyed idealism comes with a price." *Id.*

Symbolism has continued to underlie the progressively stricter iterations of the Solomon Amendment. After the passage of the version of the Amendment in force through 2005 requiring "entry to campuses" and "access to students," law schools accommodated military recruiters by permitting them to use on-campus rooms and obtain student mailing lists, but not affirmatively assisting them via career service office channels. The military at first expressed satisfaction with these accommodations, but since 2001 – "in apparent response to the law schools' ... efforts to 'distance themselves' ... from the military's position," Pet. App. 36a – the military began insisting on equal treatment in *all* respects, despite no evidence of a threat to military recruiting efforts. Indeed, when the military received equal treatment at Yale, for example, it sent recruiters to sit in what it knew would be empty interview rooms, just to make a point. J.A. 90; *see* J.A. 132 ("[B]y singling out military recruiters, Yale *sends the message* that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations." (emphasis added)). Similarly, in passing the version of the Solomon Amendment presently in force, Congress did not rely on evidence that military recruiting would be jeopardized absent a more restrictive regime, but instead was motivated by the sentiment that on-campus "intransigence and opposition" was "intolerable," particularly "now, at a time when our nation is at war." H.R. Rep. No. 108-443(I), at 7 (2004).

In sum, the United States has failed to demonstrate any compelling interest that overrides the Solomon Amendment's clear interference with law schools' right of

expressive association. Indeed, the evidence demonstrates that the government's efforts have been animated by symbolism, not need – and therefore cannot stand.

B. The Solomon Amendment Violates Law Schools' Right to be Free from Compelled Speech.

As the court of appeals held, because the Solomon Amendment compels AALS members to "propagate, accommodate, and subsidize" the military's message, it violates those law schools' First Amendment right to be free from compelled speech. Pet. App. 27a. Under the compelled speech doctrine, "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 574-75. Compelled access impermissibly "forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 9 (1986). Yet compelled expression is precisely what the Solomon Amendment mandates through its funding restrictions.

The court of appeals properly recognized that recruiting is an expressive activity, as it necessarily involves "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." Pet. App. 28a (quotation marks omitted). Indeed, the government concedes that recruiting is speech. *See* Pet. at 13 (stating that "recruiters speak for the employers they represent"). And here, the military's recruiting message that law schools abhor is easy to identify – that discrimination on the basis of sexual orientation is acceptable and appropriate.

By requiring access "equal in quality and scope" to that afforded other employers, the Solomon Amendment forces law schools affirmatively to assist the military in spreading a

message with which they strongly disagree, by providing the military with the same communicative services offered to employers who do not discriminate. These services all involve core communicative activities: disseminating literature in student mailboxes, posting job announcements on school bulletin boards, maintaining leaflets in binders for reference by students, publishing employer information in the school catalog, emailing students about military recruiters' arrivals, scheduling appointments for students, and supplying private meeting rooms for discussions between military recruiters and students. *See, e.g.*, J.A. 94, 219, 235. Just as the government may not compel a private company to disseminate an unwanted message in its billing envelopes, *Pacific Gas*, 475 U.S. at 12-16, or force a motorist to display a four-word government motto on his license plate, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), or force a newspaper to print particular opinion pieces, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), it cannot force a private university to disseminate, carry, or host the military's recruiting message.

The government argues that Respondents' compelled speech claim fails because, as with their expressive association claim, there is no "realistic danger that the statements of military recruiters will be uniquely attributed to the school." Pet. at 15. But once again, the government has provided no evidence to that effect; if anything, the record reflects that students and faculty alike have viewed law schools' capitulation to the government's pressure as a sign that the schools do not really believe in the nondiscrimination they preach. In any event, the government erroneously assumes that attribution is necessary to establish a compelled speech violation. That is not the law. Message attribution has never been a prerequisite to a

compelled speech claim. *See, e.g., Pacific Gas*, 475 U.S. at 7 (finding a compelled speech violation even though the unwanted speaker stated that its messages were not those of the plaintiff utility company). Rather, the Court's compelled speech jurisprudence focuses on the forced "dissemination" of the unwanted message – not the perceived adoption of the message. *See Wooley*, 430 U.S. at 713 (holding that First Amendment protected individual's right not to be a "courier" for the state's message). Thus, even if there were no danger that the government's recruiting message could be attributed to host law schools, the Solomon Amendment would still violate the First Amendment by forcing those schools to abet and disseminate the government's unwelcome message.

II. LAW SCHOOLS' IMPLEMENTATION OF THE AALS AMELIORATION POLICY DOES NOT CURE THE FIRST AMENDMENT VIOLATION INFLICTED BY THE SOLOMON AMENDMENT.

At several points in its brief, the government suggests that any constitutional flaws in the Solomon Amendment may be remedied through law school disclaimers and a variety of other ameliorative measures. *See, e.g.*, U.S. Br. at 7-8, 22, 29, 42. Such reliance on amelioration as a cure-all for the infirmities of the Amendment is wholly misplaced, and ultimately exposes the weakness in the government's effort to insulate the law from meaningful First Amendment review. It also belies the government's claims of military need, for if the government readily accepts the schools' ameliorative efforts – which the schools pursue only against discriminatory employers like the military – why does the government insist on complete parity in all other respects?

Indeed, were the government's analysis correct, grave intrusions on associations' First Amendment rights would be

rectified simply by the associations' ability to express disagreement with the government's compelled message. But that has never been the case. The constitutional harm in *Dale*, for example, was not cured simply by the Boy Scouts' ability to issue a press release condemning their openly gay assistant scoutmaster. Nor were the parade organizers' First Amendment interests in *Hurley* protected merely because they could protest the inclusion of an unwanted gay, lesbian, and bisexual marching group by displaying signs and banners denouncing homosexuality. So, too, the AALS amelioration policy is no remedy for the First Amendment injury inflicted by the Solomon Amendment.

A. Amelioration Was Never Intended, and Cannot Serve, as a Substitute for the Law Schools' Message and Policy of Nondiscrimination.

Through a strict policy of nondiscrimination applicable to all aspects of the law school experience, AALS and its member schools have demonstrated a clear and unequivocal desire to create an open, tolerant learning environment, and to send the message that discrimination in any form will not be permitted. Indeed, the AALS nondiscrimination policy is based on the belief shared by AALS and its members that "individuals with a diversity of backgrounds enrich the discourse and educational energy in a classroom and throughout the institution [and that] [s]uch individuals will not participate freely unless their school accords them equal respect, dignity, and protection from discrimination." J.A. 195-96. The presence of, and compelled assistance to, recruiters who discriminate – whether the military or any other employer – necessarily frustrates that purpose. While law schools surely can and should take steps to minimize the harmful effects of compelled discriminatory recruiting on campus, amelioration does not cure the constitutional

problem created by forcing law schools actively to assist the dissemination of a discriminatory message.

As is evident from the history of the AALS amelioration policy, it was never intended to serve as a satisfactory replacement for the preferred policy of nondiscrimination. Rather, amelioration arose *in response* to the Solomon Amendment, and even then only when the AALS member schools (and their parent universities) faced the potential loss of millions of dollars in federal funding. Indeed, as the Solomon Amendment and its implementing regulations evolved over the past decade, AALS permitted amelioration to replace its pure nondiscrimination mandate only as a last resort. *See supra* pp. 8-11.

Nor does amelioration in fact operate as an adequate substitute for an active policy of nondiscrimination. The activities suggested by the AALS serve only as a countermeasure against the demonstrated "negative effect on the law school's environment of the military's discriminatory practices." AALS Memorandum 02-03, Jan. 18, 2002, at 3. The inadequacy of law schools' amelioration policies, as a practical matter, is evident from the numerous accounts in the record describing students' feelings of disillusionment and betrayal, despite schools' attempts to minimize the adverse effects of allowing military recruiting on campus. *See supra* pp. 11-12.

B. The First Amendment Protects the Law Schools' Right to Choose Their Preferred Means of Expressing Their Message of Nondiscrimination.

Not only is amelioration insufficient as a matter of fact, but the government's reliance on available ameliorative measures ignores a fundamental First Amendment precept – that the speaker, not the government, has the constitutional

right to determine for *itself* the appropriate means and method of expression. The First Amendment "protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). As this Court held in *Dale*, the First Amendment firmly protects an association's "*method* of expression." *Dale*, 530 U.S. at 655 (emphasis added). Thus, the government's claim that a law school is "free . . . to express its disagreement" with the military's policies, Pet. at 13, rings hollow, as the Solomon Amendment does not leave law schools free to express their disagreement in a manner they deem most effective and appropriate.

This Court has consistently protected an association's First Amendment right to choose for itself its method of expression. For example, in *Dale*, the First Amendment protected the Boy Scouts' chosen method of expression – even where that message was partly conveyed by requiring Scout leaders to avoid questions on sexuality altogether and "teach only by example." 530 U.S. at 655. And in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982), the Court held that community leaders had a constitutional right, grounded in the First Amendment, to bolster their message of protest against a discriminatory organization in a manner of their choosing, including refusing to support or abet that organization. Similarly, AALS and its members have chosen to convey their message of tolerance and equality through a policy prohibiting discriminatory recruiting – in the time-honored tradition of "nonviolent, politically motivated boycott designed to force governmental and economic change." *Id.* at 914. The availability of other, less effective avenues of communicating this message cannot supplant the schools' chosen method of expression. As this Court has

explained, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (quotation marks omitted); *see, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. N.J.*, 308 U.S. 147, 163 (1939).

Not only is amelioration not the preferred message of AALS and its members, but the amelioration policy is the direct result of "impermissible pressure" created by the Solomon Amendment to respond – or else be forced to appear to agree with and condone the military's discriminatory views. *Pacific Gas*, 475 U.S. at 15 n.11. This Court has recognized that such a "forced response is antithetical to the free discussion that the First Amendment fosters." *Id.* at 16. Posting disclaimers, or otherwise attempting to ameliorate the effect of military recruiting, unlawfully compels law schools to "to alter their speech to conform with an agenda they do not set." *Id.* at 9.

Indeed, because of the heightened constitutional value and importance of academic freedom, *see, e.g., Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Keyishian v. Board of Regents of University of New York*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 250 (1957); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 237 n.3 (2000) (Souter, J. concurring in the judgment), an educational institution's expressive choices are accorded greater protection than other institutions outside of the academy. An academic institution has a right firmly grounded in the First Amendment "to determine for itself on academic grounds," not just "who may teach," but also

"what may be taught, [and] *how* it shall be taught." *Sweezy*, 354 U.S. at 263 (Frankfurter, J. concurring).

In any event, even if contrary to logic and the record evidence the amelioration measures pursued by AALS members were deemed to be adequate substitutes for the law schools' preferred expression, they would not cure the unconstitutionality of the Solomon Amendment. Violations of AALS members' First Amendment rights are not remedied simply by a speaker's ability to pursue secondary or tertiary means of communication – regardless how effective a court deems those means to be. *See, e.g., Pacific Gas*, 475 U.S. at 15 n.11 ("[t]he presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure on appellant to respond to [unwanted] speech"); *Wooley*, 430 U.S. at 714; *Tornillo*, 418 U.S. at 255-58; *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

PAUL M. SMITH *
WILLIAM M. HOHENGARTEN
DANIEL MACH
KATHLEEN R. HARTNETT
AYODELE T. CARROO
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

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* *Counsel of Record*

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DONALD H. RUMSFELD,
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Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC., *et al.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, HUMAN RIGHTS CAMPAIGN, AND LEGAL MOMENTUM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

BETH S. BRINKMANN
Counsel of Record
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-1500

RUTH N. BORENSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7000

SEPTEMBER 21, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations dedicated to the elimination of discrimination on the basis of irrelevant personal characteristics, including sex and sexual orientation, as well as race, national origin, disability, and age, so that each person is judged based on his or her individual abilities.

Bay Area Lawyers for Individual Freedom (BALiF) is the nation's oldest and largest bar association of Lesbians, Gay Men, Bisexuals, and Transgendered persons (LGBT) in the field of law. BALiF serves to take action on questions of law and justice that affect the LGBT community; to strengthen professional and social ties among LGBT members of the legal profession; to build coalitions with other legal organizations to combat all forms of discrimination; to promote the appointment of LGBT attorneys to the judiciary, public agencies and commissions in the Bay Area; and to provide a forum for the exchange of ideas and information of concern to members of the LGBT legal community.

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where gay, lesbian, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 600,000 members nationwide committed to making this vision of equality a reality. HRC supports the ability of respondents to enforce non-discrimination policies that ensure equal opportunity

---

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

of their students to legal education and career services regardless of sexual orientation. Equal opportunity in education, especially legal education, is critical in part because of the influential position many graduates of American law schools hold in our nation's private corporations, policymaking bodies and the judiciary.

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is committed to promoting equality without regard to sex, and recognizes sexual orientation discrimination as indistinguishable from other forms of sex discrimination. Legal Momentum supports the law school non-discrimination policies at issue in this case because of their tremendous impact in opening the practice of law to greater participation by women and people of color as well as gay men and lesbians. Legal Momentum is also concerned that the Court's decision uphold free speech rights without eroding congressional power to promote civil rights through statutes, like Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, enacted pursuant to the Spending Clause.

SUMMARY OF ARGUMENT

Amici here address petitioners' erroneous argument (Pet. Br. 40-43) that the Solomon Amendment, 10 U.S.C. § 983, can somehow be sustained as a condition on the receipt of federal funds, even if, as respondents correctly argue, the statute unconstitutionally abridges the First Amendment rights of academic institutions as a direct regulation. *Amici* also address petitioners' flawed effort to align the Solomon Amendment with the federal civil rights statutes that are aimed at eradicating federal funding of discrimination on the basis of sex, race, and other irrelevant personal characteristics.

I.A. The unconstitutional conditions doctrine prohibits the government from denying a benefit to a person on a basis that infringes his or her constitutionally protected freedom of speech, even if the person has no entitlement to the benefit. *See United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality). The Solomon Amendment's denial of substantial sums of federal money to an academic institution for exercising its First Amendment rights is akin to, and indeed of a greater magnitude than, the denial of other federal benefits that the Court has found unconstitutionally abridged speech. *See Speiser v. Randall*, 357 U.S. 513 (1958); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). Thus, the Solomon Amendment clearly constitutes an unconstitutional penalty because it would abridge First Amendment rights if imposed as a direct government mandate, and the design of the Solomon Amendment as a condition on federal funds, instead, does not cure that unconstitutionality. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 401 n.27 (1984).

B. Petitioners attempt to avoid the unconstitutional conditions doctrine by invoking cases that rejected challenges to government conditions that were tied to particular federal spending programs. But these cases recognize only that, when the government establishes a program or subsidy for specified ends, the government may "insist[] that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). By contrast, when, as in this case, the federal benefits at issue are not limited to any one particular program, the statute must be reviewed, for First Amendment purposes, as if it were a direct government regulation of the entity.

C. Petitioners are wrong in claiming that the unconstitutional conditions doctrine prohibits government conditions on funding only if they aim to suppress ideas that the government views as "dangerous." In *National*

Endowment for the Arts v. Finley, 524 U.S. 569 (1998), the Court held that an invidious purpose on the part of the government is one ground for invalidating a condition that curtails constitutional rights when the condition applies to a selective funding program, relates directly to the underlying purpose of the funding program, and applies to the use of only the federal funds themselves. Unlike the statute in *Finley*, the government's condition here is not tied directly to a benefit that is awarded on subjective, competitive criteria.

Even if petitioners were correct that the unconstitutional conditions doctrine applies only where the government intends to suppress a specific viewpoint, the Solomon Amendment would still be invalid under that standard. The statute's express exemption for institutions that exclude military recruiters based on a "longstanding policy of pacifism based on historical religious affiliation," 10 U.S.C. § 983(c)(2), unequivocally demonstrates that the viewpoint animating an institution's policy was dispositive to Congress. Moreover, the statute and its implementing regulations allow continued federal funding of academic institutions whose exclusion of military recruiters is based on a policy that excludes all recruiters or that excludes military recruiters due to lack of student interest. Those exceptions make clear that it is an institution's viewpoint for limiting military recruiters' access, not the limitation, that is determinative of whether the institution is penalized by denial of federal funds. The events surrounding the Solomon Amendment's passage also confirm that the statute was intended to suppress a particular point of view.

II. The unconstitutionality of the Solomon Amendment does not undermine the constitutionality of the federal civil rights statutes that were enacted as conditions on the receipt of federal funds. Unlike the Solomon Amendment, those statutes meet the stringent requirements of the Court's unconstitutional conditions doctrine.

A. The federal civil rights statutes that have been enacted under the Spending Clause, Art. I, § 8, cl. 1, to prohibit federal funding of entities that discriminate on the basis of race, color, or national origin (Title VI of the Civil Rights Act of 1964), sex (Title IX of the Education Amendments of 1972), disability (Section 504 of the Rehabilitation Act of 1973), and age (Age Discrimination Act of 1975), have been uniformly upheld as valid exercises of that congressional authority.

These statutes also survive scrutiny under the unconstitutional conditions doctrine because the government has a compelling interest in avoiding funding private entities that discriminate against individuals on the basis of such irrelevant personal characteristics. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality). Indeed, these statutes may, unlike the Solomon Amendment, reflect a constitutional prohibition against government funding of invidious private discrimination. *See Cooper v. Aaron*, 358 U.S. 1, 19 (1958); *Norwood v. Harrison*, 413 U.S. 455, 466 (1973); *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974). The Constitution grants scant protection to the right of private entities to discriminate against individuals on the basis of irrelevant personal characteristics.

B. These civil rights statutes are distinct from the Solomon Amendment also because their primary goal is to prevent the federal government and its taxpayers from funding discrimination against taxpayers on irrelevant grounds. The injury to taxpayers from government funding of invidiously discriminatory entities is not merely a matter of citizens' disagreement with a private institution's policies. Government funding also forces some taxpayers to support financially an organization that they, themselves, could not benefit from because of irrelevant personal characteristics. The only way to achieve that compelling interest in protecting the rights of all taxpayers is to deny the funding.

By contrast, the government interest underlying the Solomon Amendment is an instrumental one. The withholding of funds is not an end in itself, but rather is being used to coerce academic institutions to speak for and associate with a discriminatory employer. That difference in governmental interest distinguishes the First Amendment challenge to the Solomon Amendment from the Court's rejection of a First Amendment challenge to Title IX in *Grove City College v. Bell*, 465 U.S. 555 (1984). *Grove City* reflects this Court's deep-seated understanding that non-discrimination conditions on financial assistance are constitutional because a proscription on discrimination based on an irrelevant personal characteristic such as sex furthers the compelling governmental interest in not subsidizing such discrimination with taxpayer's money and is the only means to achieve that interest.

C. The extension of the federal civil rights statutes to prohibit federal funding of the entirety of a discriminatory entity, as opposed to just a particular program, was necessary due to the unique nature of discrimination against individuals and the interest in not funding such conduct, which distinguishes those statutes from the Solomon Amendment's similar coverage. Any claim that federal funding restrictions on an entire academic institution is the only means to convince the institution to increase access of military recruiters to a particular program, hinges on the blunt instrument of unconstitutional coercion.

ARGUMENT

The Solomon Amendment, 10 U.S.C. § 983, denies federal funds to any academic institution that has a generally applicable antidiscrimination policy limiting the access to the campus and students of recruiters for employers who discriminate on the basis of sexual orientation

(or race or other irrelevant personal characteristics), if the institution refuses to exempt the military from that policy. The court of appeals correctly held that respondents – the Forum for Academic and Institutional Rights, Inc. (FAIR) and others – are entitled to a preliminary injunction against enforcement of the Solomon Amendment because FAIR demonstrated a likelihood of success on its claim that the Solomon Amendment violates the First Amendment rights of the academic institutions that are members of FAIR.

Although the court of appeals found the Solomon Amendment likely to violate the First Amendment, the court did not hold that Congress lacked the power under Article I to enact such statutes under its Spending Clause authority. FAIR does not challenge the statute on that ground and such a holding is not necessary or appropriate to sustain the lower court's judgment. Indeed, *amici* here are dedicated to the enforcement of other Spending Clause statutes that are aimed at eradicating federal funding of discrimination on the basis of sex, race, and other irrelevant characteristics. Unlike the Solomon Amendment, those statutes do not violate the First Amendment because they meet the stringent requirements of the Court's unconstitutional conditions doctrine for reasons we discuss in detail in Part II below.[2]

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[2] These two inquiries into a statute's constitutionality are "alternative ground[s]," *United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality), and, thus, do *not* rise and fall together. A statute can be challenged on the ground that Congress was not authorized by the Spending Clause in Article I of the Constitution (or some other constitutional grant of authority) to enact the particular legislation, *see id.* at 203 & n.2 (plurality); *Pierce County v. Guillen*, 537 U.S. 129, 147 & n.9 (2003), but an otherwise authorized exercise of Article I also can be challenged alternatively, as here, as barred by the First Amendment or some other constitutional provision. *See American Library Ass'n*, 539 U.S. at 210 (plurality); *Guillen*, 537 U.S. at 148 n.10.

I. The Solomon Amendment Unconstitutionally Conditions The Receipt Of Federal Funds On The Waiver By Academic Institutions Of Their First Amendment Rights

The refusal of academic institutions, including their law schools or other components, to include employers who discriminate on the basis of sexual orientation in various school publications, announcements, and private fora relating to recruiting, and the refusal of those institutions to exempt military recruiters from that policy, is conduct protected by the First Amendment. *Amici curiae* agree with the court of appeals' ruling to this effect and support the arguments by FAIR and the other *amici* that address that issue.

The instant *amicus* brief addresses the error in the narrower argument advanced by petitioners (Pet. Br. 40-43) that, even if the Solomon Amendment would unconstitutionally abridge the First Amendment rights of academic institutions if the restriction were imposed as a direct governmental regulation mandating access for military recruiters, the constitutionality of the statute can still somehow be sustained as a condition on the receipt of federal funds. In doing so, petitioners distort this Court's longstanding doctrine prohibiting unconstitutional conditions.

A. The Unconstitutional Conditions Doctrine Prohibits The Government From Withholding Federal Funds From An Entity Because The Entity Is Exercising Its First Amendment Rights If The Government Could Not Regulate That Exercise Directly

Under the unconstitutional conditions doctrine, the government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that

benefit." *United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality) (quoting *Board of Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1973))); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983) ("[It] is certainly correct * * * that we have held that the government may not deny a benefit to a person because he exercises a constitutional right.").

The unconstitutional conditions doctrine is a manifestation of the broader doctrine that "an indirect attempt to accomplish what the Constitution prohibits [the government] from accomplishing directly" is unconstitutional because "[c]onstitutional rights would be of little value if they could be . . . indirectly denied." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829-830 (1995) (internal quotation marks omitted).

The Solomon Amendment denies a benefit (significant amounts of federal financial assistance) to an academic institution if the institution exercises its First Amendment right to refuse, or allows one of its components to refuse, to speak on behalf of and associate with employers that discriminate on the basis of irrelevant personal characteristics. This denial of federal financial assistance to such academic institutions is an abridgement by the government of the institution's First Amendment rights because the government is penalizing the exercise of those rights.

This denial of federal financial assistance is like the denial of a state tax exemption in *Speiser v. Randall*, 357 U.S. 513 (1958), which the Court found unconstitutionally abridged speech. In that case, the Court held that a California law that denied an otherwise available tax exemption to qualified individuals (veterans) if they refused to engage in certain speech (signing a loyalty oath) would "have the effect of coercing the claimants" and thus was "a limitation on free speech." *Id.* at 518-519; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 603-604

(1983) ("[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools," and can be withdrawn only when "no 'less restrictive means,' are available to achieve" a compelling governmental interest).

Similarly, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Court held that the government could not withhold from an employee the benefit of transferring from one government job to another based on the employee's exercising his First Amendment rights, unless withholding the job location transfer was "narrowly tailored to further vital government interests." *Id.* at 74. There, the government had denied its employee the transfer due to his political affiliation, which the Court ruled "impermissibly encroach[ed] on First Amendment freedoms" because the "long daily commutes" that the employee had to endure absent the transfer imposed "significant penalties" on "the exercise of rights guaranteed by the First Amendment." *Ibid.*; *see also American Library Ass'n*, 539 U.S. at 212 n.6 (plurality) (holding that *Rutan* "involved true penalties").

The denial of substantial sums of federal money to an academic institution is akin to, and indeed of a greater magnitude than, the denial of a tax exemption or a job location transfer, and thus clearly constitutes a government penalty that is unconstitutional if the condition would abridge First Amendment rights if imposed directly. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 827-829 (1995) ("the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression").

But petitioners attempt to avoid the unconstitutional conditions doctrine in this case by describing certain narrow exceptions to that doctrine as if they were the rule. Once these exceptions are cleared away, however, as we do

below, it is apparent that petitioners have only the refrain that, because the government could elect not to fund academic institutions at all and an institution could decline the funds, the government can impose whatever conditions it wishes on the receipt of those funds. Pet. Br. 24, 40, 41. That, of course, is the very proposition that this Court's unconstitutional conditions cases have consistently rejected for more than a century. *See, e.g., Barron v. Burnside*, 121 U.S. 186, 200 (1887) ("As the Iowa statute makes the right to a permit [to do business in the State] dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must he held to be void."); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the [right].").

The government's suggestion that it may bribe an entity or individual to forego its constitutional rights by a promise of greater funding (or of not withdrawing funding) has been rejected because it has no logical stopping point. As the Court succinctly explained in *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593 (1926), "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Thus, the Solomon Amendment's design as a condition on federal funds is not determinative of the constitutional inquiry. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 401 n.27 (1984) (rejecting the argument that "a lesser degree of judicial scrutiny was required simply because Government funds were involved"). Like all

statutes that curtail First Amendment rights, the Solomon Amendment must meet strict scrutiny (or, at the very least, the intermediate scrutiny standard described in *United States v. O'Brien*, 391 U.S. 367 (1968)) to survive a constitutional challenge. The court of appeals correctly ruled that the Solomon Amendment does not meet that standard because, in short, the government has not demonstrated that it cannot recruit effectively by means that impose less burdens on the First Amendment. Pet. App. 23a-24a, 40a, 45a-46a.

B. Petitioners Err In Relying On Cases That Reflect The Unexceptional Proposition That The Unconstitutional Conditions Doctrine Has A Narrower Scope When The Government Directs The Way Federal Dollars Are Spent By Recipients

Seeking to avoid the plain import of this Court's "well-settled doctrine" that the government cannot obtain through the threat of withholding benefits what it cannot require directly, *Dolan*, 512 U.S. at 385, petitioners invoke cases that rejected unconstitutional conditions challenges to government conditions that are tied to particular federal spending programs. But these cases recognize only that, when the government establishes a program or subsidy for specified ends, the government may "insist[] that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *see also American Library Ass'n*, 539 U.S. at 211-212 (plurality); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 583-585 (1998).

When conditions on federal funding have been tied to a particular program for which the federal funds are offered, the conditions have been upheld by the Court against unconstitutional conditions challenges in certain circumstances. For purposes of the unconstitutional

conditions doctrine, valid conditions on specific federal spending programs are limited to cases in which the condition is required to advance the "programmatic message" of the funding program to which the condition was attached. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (holding that the lack of "programmatic message" in the funding for Legal Services Corporation distinguished the restriction on program recipients from the restrictions in *Rust* and "place[d] it beyond any congressional funding condition approved in the past by this Court"). And there are constitutional limits on how a federal program can be described in such cases. The government cannot, for example, describe a grant for cancer research as a program "to develop cures for cancer at academic institutions that allow military recruiting." The Court has emphasized that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Id.* at 547.

Rust is an example of this category of cases, where the Court rejected an unconstitutional conditions challenge to a federal statute that dictated how particular federal funds could be spent. But that ruling made clear that the receipt of federal funds was tied to the particular program that Congress intended to further and was not conditioned on how the recipient spent other funds. 500 U.S. at 199 n.5 ("The regulations are limited to Title X funds; the recipient remains free to use private, non-Title X funds to finance abortion-related activities.").

By contrast, when, as in this case, the federal benefits that the government threatens to withdraw are not limited to a particular program, the statute must be reviewed, for First Amendment purposes, as if it were a direct government regulation of the entity. This category of case is exemplified by *FCC v. League of Women Voters*, where the Court found that a federal statute prohibiting

noncommercial television stations from engaging in editorializing violated the First Amendment. There, the prohibition's tie to federal funds was irrelevant because the breadth of the prohibition extended well beyond the funding received without any justification. *See* 468 U.S. at 400-401; *see also Rust*, 500 U.S. at 197 ("our 'unconstitutional conditions' cases involve situations in which the Government has * * * effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program"). Similarly, this Court held in *Harris v. McRae*, 448 U.S. 297 (1980), that Congress could withhold federal assistance that would have paid for abortions for indigent women, but noted at the same time that "[a] substantial constitutional question would arise if Congress had attempted to withhold *all* Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Id.* at 317 n.19 (emphasis added).

The Solomon Amendment is in this second category because it is not limited to conditioning receipt of federal funds on how those federal funds are spent. Petitioners point to nothing in the record that suggests that any of the federal funds received by the academic institutions (or respondent FAIR's law school members) are directed for spending on recruitment services. Rather the Solomon Amendment is a condition attached to hundreds of discrete spending programs that have nothing at all to do with the recruitment of lawyers for the military. It therefore does not fall within the exception from the unconstitutional conditions doctrine for conditions that are tied to federal funding for particular programs.

C. Even If The Solomon Amendment Were Tied To The Way Particular Federal Funds Are Spent By A Recipient, It Would Still Be An Unconstitutional Condition Because It Aims To Suppress A Specific Viewpoint

1. The unconstitutional conditions doctrine is not limited, as petitioners claim, to prohibiting only government conditions on funding that aim to suppress ideas that the government views as "dangerous." Pet. Br. 41 (citing *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1989)). Indeed, this Court has "emphasized that conditions upon public benefits cannot be sustained if they so operate, *whatever their purpose*, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (emphasis added). Thus, in *Sherbert*, the Court held that the State could not deny unemployment benefits to a woman who refused to work on Saturdays when doing so would force her either to forgo her religious practice or to forfeit government benefits, even though the State did not disapprove of the woman's religion or view the religion as dangerous.

The Court has never held that conditions on federal funding are unconstitutional only if aimed at suppressing dangerous ideas. Petitioners rely on a section in *Finley* where the Court noted an apparent exception to the general rule that the government's motives are irrelevant in determining the constitutionality of a condition on federal funding because, there, Congress placed a condition on "competitive" funding for the arts that was intended to be used for the particular purpose of promoting "excellence" in art. The Court held that the First Amendment "certainly has application" in that context, but reasoned that the government had more latitude than if it were regulating art directly. Thus, the Court required only that the government "not 'ai[m] at the suppression of dangerous ideas,' and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate."

524 U.S. at 587. The Court also cautioned, however, that "a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Ibid.*

Finley thus means only that an invidious purpose on the part of the government is one ground (apparently distinct from assessing the "coercive effect" or "disproportionate burden") for invalidating a condition that curtails constitutional rights when the condition applies to a selective funding program, relates directly to the underlying purpose of the funding program, and applies to the use of only the federal funds themselves. This is not the situation with the Solomon Amendment. Unlike the statute in *Finley*, the government's condition here is not tied directly to a benefit that is awarded on subjective, competitive criteria. Instead, the condition imposed by the Solomon Amendment applies to a host of federal funds that themselves have no nexus to the First Amendment right that the government is seeking to have respondent FAIR's members abandon.

2. Even if petitioners were correct that, as a result of *Finley*, the unconstitutional conditions doctrine applies only where the government intends to suppress a specific viewpoint, the Solomon Amendment would still be invalid. The government's assertion of a facially reasonable, even compelling, rationale for the Solomon Amendment – that it serves to promote military recruiting – cannot render the statute constitutional if the statute is "*in fact* based on the desire to suppress a specific point of view." *Cornelius v. NAACP*, 473 U.S. 788, 811-812 (1985) (emphasis added).

The government's claim that the statute is "entirely indifferent to an institution's reason for denying equal access," Pet. Br. 42, is belied by the express exemption in the text for institutions that exclude military recruiters because the institutions have a "longstanding policy of

pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2). That statutory exemption, added in 1996, for policies that are motivated by longstanding pacifism principles rather than nondiscrimination principles, unequivocally demonstrates that the viewpoint underlying an institution's policy that excludes military recruiters was dispositive to Congress. At bottom, Congress authorized federal funds to go to institutions that exclude military recruiters so long as it found acceptable the viewpoint supporting the institution's policy. *See* 142 Cong. Rec. 12,712-12,713 (1996) (Rep. Goodlatte) (explaining support for exemption for those not participating in military activities based upon their deeply found religious beliefs" because "I think if they are not simply antimilitary based upon a political position of the time but rather have that deep-seated opinion, then they should have that exemption and should still be able to apply for funds for legitimate scientific programs at their institutions").

The statutory exemption reflects the intent of Congress. *See United States v. Eichman*, 496 U.S. 310, 317 (1990) (examining "precise language" and "explicit exemption" in statute in determining Congress's intent). Congress made clear that an exclusion based on "antimilitary" opinion is not a disqualifying ground for receipt of federal funds, but that such an exclusion (or even limited access) is disqualifying when promulgated by an institution that refuses to be forced to support recruiting of its students by employers who discriminate against students on the basis of sexual orientation, in violation of the institution's stated policies and mission. *Cf.* 140 Cong. Rec. 11,442 (1994) (Rep. Engel) (explaining, in opposition to the Amendment generally, that "the denial of military recruiting on certain campuses is based not on an antimilitary ideological stance, but rather, on the principles of law" that "prohibit access to recruitment facilities to all employers who discriminate on the basis of sexual orientation, including the military").

Moreover, the statute, by implication, and its implementing regulations by their express terms do not require the withholding of federal funds from academic institutions that exclude military recruiters so long as the institutions exclude all recruiters. *See* 32 C.F.R. § 216.4(c)(3). They also allow federal funding to institutions that exclude military recruiters by relying on student interest to determine who to allow on campus and students express no interest in hearing from military recruiters. *See id.* § 216.4(c)(6)(ii). Although these exceptions are viewpoint neutral, they make clear that it is an institution's viewpoint for limiting military recruiters' access, not the limitation itself, that is determinative of whether the institution is penalized by denial of federal funds.

3. The events surrounding the Solomon Amendment's passage confirm that the statute was motivated to suppress a particular point of view rather than to remove any significant barrier to military recruiting. The initial passage of the statute was opposed by the Department of Defense. The Department of Defense explained that the legislation was not needed in order to ensure the availability of qualified military recruits. *See* 140 Cong. Rec. 11,441 (1994) (Rep. Schroeder) (discussing views of Department of Defense).

Legislators who spoke in favor of the Solomon Amendment made clear that they supported the legislation because it would suppress policies that were motivated by a viewpoint with which they disagreed, *i.e.*, one that sought to protect students from discriminatory practices of employers, including the military. *See, e.g.*, 140 Cong. Rec. 11,441 (1994) (Rep. Pombo) ("A growing, and misguided, sense of moral superiority is creeping into the policies of colleges and universities in this country when it comes to such things as military recruiting * * * on campus" and they "need to be put on notice that their policies of

ambivalence or hostility towards our Nation's armed services do not go unnoticed – either by this House or by the American people."); *id.* at 12,358 (Rep. Bereuter) ("In banning military recruiters, the universities are making wholly inappropriate value judgments about the Armed Forces" by reacting to "the Pentagon's position on homosexuals in the military"); *id.* at 11,441 (Rep. Rohrbacher) (academic institutions that exclude military recruiters "insult our military personnel" and "do not care about our Nation's security," but instead "have given in to these political activists, who seek to use the military to achieve a domestic social agenda").

Members of Congress made clear that they supported the Solomon Amendment precisely because the threatened withholding of federal funds would "send a message" to academic institutions that excluded military recruiters based on opposition to the military's discriminatory employment policy. 141 Cong. Rec. 15,949 (1995) (Rep. Pombo); *see also id.* at 595 (Rep. Solomon) ("I am told by the Pentagon that schools across the country are getting the message and preparing to accommodate recruiters rather than lose their precious funding.").

II. The Unconstitutionality Of The Solomon Amendment Does Not Undermine The Constitutionally Valid Federal Spending Clause Statutes That Prohibit Federal Financial Assistance For Entities That Discriminate Against Individuals On The Basis Of Irrelevant Personal Characteristics

Over the course of the past 40 years, Congress has exercised its authority under the Spending Clause, Art. I, § 8, cl. 1, to prohibit federal funding of entities that discriminate on the basis of personal characteristics irrelevant

to individual ability or merit, in furtherance of the Equal Protection Clause's goal that each individual be judged "by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Although such federal civil rights statutes rely upon the analogous Spending Clause authority as the Solomon Amendment, these statutes are distinct from the Solomon Amendment in several respects material to the determination of their constitutionality under the unconstitutional conditions doctrine.

A. The Federal Civil Rights Statutes Further Compelling Governmental Interests, And May Be Constitutionally Mandated In Some Instances

1. The foundational civil rights statute under the Spending Clause is Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits federal agencies from providing financial assistance to entities that discriminate on the basis of race, color, or national origin. This Court recognized in *Lau v. Nichols*, 414 U.S. 563 (1974), that Congress enacted Title VI because "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Id.* at 569 (quoting 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from President Kennedy's message to Congress)). *Lau* held that Title VI was a valid exercise of Congress's power under the Spending Clause "to fix the terms on which its money allotments to the States shall be disbursed." *Id.* at 569.[3]

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[3] In *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001), the Court rejected *Lau*'s interpretation of Title VI "as reaching beyond intentional discrimination," but did not cast doubt on *Lau's* ruling on the Spending Clause.

Congress subsequently used Title VI as a model for enactment of additional statutes that prohibit federal agencies from providing funds to entities that discriminate on the basis of other irrelevant personal characteristics. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (sex); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (disability); Age Discrimination Act of 1975, 42 U.S.C. § 6101 (age).[4]

The federal civil rights statutes are valid exercises of Congress's authority under the Spending Clause and the Fourteenth Amendment to ensure that federal funds are not spent in support of policies that violate the letter and spirit of the Equal Protection Clause. This has been the uniform holding of the lower courts that have addressed the issue, all sustaining these statutes as valid Spending Clause legislation. *See, e.g., Barbour v. WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1591 (2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128-129 (1st Cir. 2003); *Koslow v. Pennsylvania*, 302 F.3d 161, 169-171 (3d Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003); *Constantine v. George Mason Univ.*, 411 F.3d 474, 493 (4th Cir. 2005); *Miller v. Texas Tech Univ. Health Scis. Ctr.*, No. 02-10190, 2005 U.S. App. LEXIS 17244 (5th Cir. Aug. 15, 2005) (en banc); *Jim C. v. Arkansas Dep't of Educ.*, 235 F.3d 1079, 1084 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949 (2001); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *United States v. Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court).

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[4] State and local governments likewise have decided not to bestow taxpayer money on entities that discriminate against some of those taxpayers on the basis of other irrelevant personal characteristics such as sexual orientation. *See, e.g.*, Conn. Gen. Stat. § 46a-81n(b); Berkeley, Cal., Mun. Code § 13.28.060(A)(3).

2. This Court has made clear that the government has a compelling interest in avoiding funding private entities that discriminate against individuals on the basis of irrelevant personal characteristics. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality); *see Bob Jones Univ. v. United States*, 461 U.S. 574, 591, 593 (1983) ("Government has a fundamental, overriding interest in eradicating racial discrimination in education," which warrants denial of tax exemptions to discriminatory private schools because "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors' ").[5]

Further, these civil rights statutes may, unlike the Solomon Amendment, reflect a constitutional prohibition against government funding of invidious private discrimination. *See Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement,

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[5] The governmental interest in not giving taxpayers' money to private entities that discriminate against some of those taxpayers is distinct from the governmental interest in preventing discrimination, which is a separate compelling interest that supports the constitutionality of these statutes as well. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (State's "compelling interest in eradicating discrimination against its female citizens justifies" the burden placed on a group's associational freedoms); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 92 n.5 (2d Cir. 2003) (separate opinion of Calabresi, J.) ("a state that has adopted a policy of equal protection with respect to a specific group may have a compelling interest in the enforcement of that policy, even if the federal government has not recognized that same group's claim to heightened scrutiny for the purposes of equal protection"), *cert. denied*, 541 U.S. 903 (2004).

management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"); *Norwood v. Harrison*, 413 U.S. 455, 466 (1973) ("A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination."); *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) ("The constitutional obligation of the State 'requires it to steer clear not only of operating the old dual system of racially segregated schools but also of giving significant aid to institutions that practice racial or other invidious discrimination.'"); *United States v. Virginia*, 518 U.S. 515, 599 (1996) (Scalia, J., dissenting) (suggesting that the Court's cases mandate a holding that "the government itself would be violating the Constitution by providing state support to single-sex colleges").

The government's compelling interest in not funding invidious private discrimination is bolstered by the fact that the Constitution grants scant protection to the right of private entities to discriminate against individuals on the basis of irrelevant personal characteristics. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("'[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.' There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union."); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (same). Thus, even where the government has the constitutional discretion whether to fund a discriminatory entity, it may elect not to do so simply to avoid supporting discriminatory entities. *Cf. Norwood*, 413 U.S. at 463 ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."); *Boy Scouts of Am.*

v. Wyman, 335 F.3d 80, 97-98 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004).

B. The Civil Rights Statutes Do Not Seek Merely To Alter The Behavior Of Fund Recipients, But To Protect The Rights Of All Of The Government's Taxpayers, Including Those Who Are Victims Of The Recipient's Discrimination

The civil rights statutes that prohibit federal funding of entities that engage in invidious discrimination against individuals are distinct from the Solomon Amendment also because the primary goal of the civil rights statutes is to prevent the federal government, and its taxpayers, from funding such discrimination. *See Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) ("Congress wanted to avoid the use of federal resources to support discriminatory practices"). And the only way to achieve that compelling interest (narrowly tailored or otherwise) is to deny federal funds to entities that discriminate. *Cf. Bob Jones Univ.*, 461 U.S. at 604 ("no 'less restrictive means' are available to achieve the governmental interest" in avoiding subsidizing discrimination than to not subsidize discrimination).

The injury to taxpayers from government funding of invidiously discriminatory entities is not merely a matter of citizens' disagreement with a private institution's policies. Rather, government funding of discriminatory entities would force some taxpayers to subsidize an organization that they, themselves, could not benefit from simply because of irrelevant personal characteristics.

No such claims can be made if some portion of the public objected to the limitations placed by academic institutions on the access allowed recruiters for the military and other employers who discriminate. Although recruiters *qua* recruiters might be barred from campuses,

that would be only in the context of recruiting activities, not as individuals or taxpayers and not based on irrelevant personal characteristics.

The Solomon Amendment was enacted solely to change behavior of academic institutions and to punish those that did not change. The government does not claim that federal funding of such entities, itself, imposes any independent injury on the federal government. The only legitimate interest purportedly underlying the Solomon Amendment is an instrumental one – the use of the significant federal purse strings to coerce academic institutions to speak for and associate with a discriminatory employer.

That is distinct from the civil rights statutes that Congress enacted pursuant to its Spending Clause authority to prohibit federal financial support of entities that invidiously discriminate against individuals. And this case is therefore distinct from the Court's cursory rejection of a First Amendment challenge to Title IX in *Grove City College v. Bell*, 465 U.S. 555 (1984), which was warranted because of the government's compelling interest in avoiding funding private discrimination. Grove City College had argued that, even if it were deemed to receive federal financial assistance and was thus covered by Title IX's proscription against sex discrimination, Title IX could not be applied to it because to do so would infringe its First Amendment right to be free to choose whether to discriminate on the basis of sex "without government compulsion." Pet. Br., *Grove City College v. Bell*, No. 82-792, at 47-50. Grove City did not rely on the unconstitutional conditions cases (or, in fact, any First Amendment cases) in its brief. When the Court rejected Grove City's argument, it explained that "Congress is free to attach *reasonable* and unambiguous conditions to federal financial assistance

that educational institutions are not obligated to accept." 465 U.S. at 575 (emphasis added).

That sentence is not, however, the definitive statement of the general limits that the Constitution places on denial of federal funds to academic institutions that refuse to exercise their constitutional rights in a manner desired by the federal government, other than in the circumstance of discrimination against taxpayers based on personal characteristics. Other than that unique area of avoiding federal funding of such discriminatory institutions, there is no indication of any broader reach, much less any indication of an overruling of the entire unconstitutional conditions doctrine. Indeed, the only authority cited by the Court to support that proposition in *Grove City* was *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), which involves only Congress's authority under the Spending Clause, and is not part of the large body of existing case law expounding the unconstitutional conditions doctrine.

Grove City reflects this Court's deep-seated understanding that non-discrimination conditions on financial assistance are constitutional because a proscription on discrimination based on an irrelevant personal characteristic, such as sex, furthers the compelling governmental interest in not subsidizing such discrimination and is the only means to achieve that interest. The Solomon Amendment, by contrast, was intended solely to alter the behavior of academic institutions to force them to disseminate the government's message, rather than to ensure that taxpayers' dollars not subsidize activities that certain taxpayers do not have an equal opportunity in which to participate due to discrimination.

C. Discrimination, Unlike The Recruiting At Issue In This Case, Cannot Easily Be Cabined Within One Program And Thus Entity-Wide Conditions Are Necessary To Further The Government's Anti-Discrimination Goal But Not Its Interest In Military Recruiting

Petitioners note (Pet. Br. 43 n.7) that the federal civil rights statutes, like the Solomon Amendment, all apply to the entirety of an entity that receives federal funds, and not just to the particular program that is directly supported by the federal funds. But the extension of the federal civil rights statutes to prohibit funding to the entirety of an entity was rooted in unique features about the nature of discrimination against individuals that justifies the reach of those statutes but does not justify the Solomon Amendment's similar coverage.

Congress extended the scope of the funding condition in response to this Court's holding in *Grove City* that the term "program or activity" as used in Title IX was limited to the recipient's program that accepted the money, and did not apply the non-discrimination prohibition to the entire institution. Following that ruling, Congress engaged in extensive hearings and deliberations that culminated in enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). That statute defines the term "program or activity" in Title VI, Title IX, Section 504, and the Age Discrimination Act to mean, for governmental entities, "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a(1)(A); 20 U.S.C. § 1687(1)(a); 29 U.S.C. § 794(b)(1)(A); 42 U.S.C. § 6107(4)(A).

Congress thus determined that the infectious nature of discriminatory policies demanded that the denial of government support for an institution engaging in

discrimination be institution-wide rather than program specific. This Court had previously reached the same conclusion under the Constitution. *See Norwood*, 413 U.S. at 468-469 ("[L]egitimate educational function cannot be isolated from discriminatory practices * * * . [D]iscriminatory treatment exerts a pervasive influence on the entire educational process."); *Bob Jones Univ.*, 461 U.S. at 592 ("The *institution's* purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." (emphasis added)).

When Congress was considering the extension of the federal civil rights statutes funding restrictions to the entirety of an entity, there were findings that restrictions specific just to a particular program at an institution would still risk the public perception that the government endorses discrimination. *See Civil Rights Act of 1984: Joint Hearings on H.R. 5490 Before the House Comm. on Educ. & Labor and the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 98th Cong. 39 (1984) (statement of Rep. Anderson) ("Our failure to clarify the intent of these statutes would be tantamount to condoning discrimination at colleges and universities benefitting [sic] from Federal assistance.") [hereinafter 1984 House Hearings]; *id.* at 157 (statement of Arthur Fleming, Chairman, Citizens Commission on Civil Rights) ("We would not only be tolerating, we would be putting an official stamp of approval on discriminatory practices by institutions that are helping the Federal Government to discharge its responsibilities to its citizens."); *Civil Rights Restoration Act of 1987: Hearings Before the Senate Comm. on Labor & Human Resources*, 100th Cong. 7 (1987) (statement of Sen. Metzenbaum) ("It is impossible to compartmentalize discrimination. If one part of an institution discriminates, then the entire institution is tainted by that discrimination.").

In addition, from a practical perspective, allowing discrimination in one program undermines the benefits of prohibiting discrimination in another program, because only partial discouragement to students defeats the government's interest in equal access to educational opportunities. *See* 131 Cong. Rec. 2156-2157 (1985) (Sen. Packwood) ("[D]iscrimination in education is subtle but pernicious, affecting its victims for the entirety of their lives. The absurdity of the result [in *Grove City*] is apparent. It is of little use to bar discrimination in the financial aid program of an institution if a woman cannot gain admittance to, or participate in, the institution because of its other discriminatory policies and practices."); 130 Cong. Rec. 9260 (1984) (Sen. Dole) ("What difference does it make to a disabled student if the student financial aid office is in compliance with section 504, if none of the school's academic programs are accessible."); 1984 House Hearings, *supra*, at 18 (statement of Rep. Panetta) ("If you have discrimination in one aspect of an institution's operations, there is just no question that it infects the operations of the entire institution. * * * You can't have discrimination in simply one aspect and hope that somehow it doesn't impact on other areas."). Accordingly, the anti-discrimination conditions on federal funding are necessary to advance the government's compelling interest.

In contrast, such considerations cannot support the argument that restrictions on an entire academic institution are required to promote military recruiting. Any claim that funding restrictions on an entire academic institution, including divergent research programs throughout the campus, is the only means to convince the institution to increase access of military recruiters to a particular program, hinges on the blunt instrument of unlawful coercion.

CONCLUSION

For the reasons set forth above and in the respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

BETH S. BRINKMANN
Counsel of Record
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-1500

RUTH N. BORENSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7000

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No. 04-1152

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF BOY SCOUTS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DAVID K. PARK
NATIONAL LEGAL COUNSEL
BOY SCOUTS OF AMERICA
1325 Walnut Hill Lane
Irving, TX 75015
(972) 580-2000

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

SCOTT H. CHRISTENSEN
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006
(202) 721-4600

Attorneys for Amicus Curiae
Boy Scouts of America

195470

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Boy Scouts of America, as *amicus curiae*, supports reversal of the judgment of the United States Court of Appeals for the Third Circuit entered in this case. 390 F.3d 219 (3d Cir. 2004).[1]

INTEREST OF THE *AMICUS CURIAE*

Boy Scouts of America ("Boy Scouts") is a nonprofit membership organization with the mission of instilling in young people the values of the Scout Oath and Law. In furtherance of that mission, all potential youth members and adult volunteer leaders must agree to live by the Scout Oath and Law.

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court protected the selection of volunteer leadership as Boy Scouts' exercise of the right of expressive association. The state may not use nondiscrimination statutes to regulate Boy Scouts' leadership choices aimed at preserving Boy Scouts' mission. *Id.* at 655 (leadership policy is Boy Scouts' "method of expression").

Boy Scouts joins as *amicus* here for two reasons.

First, it is crucial to Boy Scouts that both the letter and the intent of *Dale* be upheld, and the decision below fails to

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1. Petitioners and Respondents granted consent to file this brief. Counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

apply *Dale* correctly. This *amicus* believes that a correct application of *Dale*, without any need to weaken the tests described therein, supports the government's case here.

Second, the government's position here is best considered by analogy to public forum doctrine. It is both reasonable and constitutionally permissible to require law schools either to accept military recruiters as participants in employer forums–essentially open to all employers or to forego federal funds. The rationale is clear from this Court's public forum precedents: law schools are not the speakers in employer forums, the employers are. This is the fundamental mistake made by the court of appeals.

The notion that the facilitator of an open or public forum thereby endorses the speech of participants in the forum is the same fundamental mistake made by courts recently with respect to Boy Scouts. These courts have excluded Boy Scouts from public forums on the theory that government agencies which set up public forums would be voicing support for the theistic or moral values of the Scout Oath and Law if Boy Scouts participated. *See Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (court ordered exclusion of Boy Scouts from the Connecticut employee charitable campaign forum open to all manner of ethnic-, gender-, age- and religious-based charities, on the basis of an argument that State statutes forbid Connecticut from supporting discrimination), *cert. denied*, 541 U.S. 903 (2004); *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (court ordered Boy Scouts excluded from the City of San Diego's leasing program open to all nonprofit lessees suitable for City properties, and currently including over 100 leases to nonprofit groups and churches, on the theory that the City's leases to Boy Scouts

constituted an endorsement of religion), *appeal docketed* Nos. 04-55732 & 04-56167 (9th Cir. Apr. 29, 2004); *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002) (court ordered Sea Scouts excluded from a Berkeley program providing free berthing to nonprofits at the City marina, and currently including several nonprofit groups serving protected populations, on the rationale that the marina's nondiscrimination ordinance applied to Boy Scouts' internal leadership policies), *review granted*, 65 P.3d 402 (Cal. 2003). However, a public forum is an opportunity provided by the facilitator of the forum for *others* to speak, and not a platform for its own speech.

The argument that the facilitator of a forum is responsible for the speech of individual participants fails to take into account this Court's public forum precedents. Here, law schools argue that they somehow speak through employment forums set up only as conduits for employers. Preventing future courts from relying on this specious argument will not only result in what is indeed "fair" for military recruiters, but will help to clarify an area of public forum doctrine which is increasingly ignored in order to penalize Boy Scouts for its speech.

SUMMARY OF ARGUMENT

The *Dale* tests for what constitutes an expressive association and what constitutes interference with expressive rights are deferential to the organization asserting those rights. First, a law school plausibly is an expressive association. The determinative fact here, however, is that the association, quite obviously, is composed of the law school's administration, its faculty and its students. Potential employers of students do not join a law school or become identified with a law school simply because they recruit at

the school. Second, employers do not seek to interfere nor do they actually interfere in law school speech. There is nothing in *Dale* that applies to invalidate the Solomon Amendment, 10 U.S.C. § 983 (2005).

The Solomon Amendment requires as a condition of receiving federal funds that military recruiters receive access equal to the employer forums that law schools already voluntarily provide other employers. This is precisely analogous to public forum cases. In such a forum, the facilitator of the forum "does not itself speak or subsidize transmittal of a message it favors." *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 834 (1995). Thus, there is no issue of military recruiters who participate in employer forums interfering with law school speech or compelling law school speech.

ARGUMENT

I. THE TESTS FOR DETERMINING CONSTITUTIONAL PROTECTION OF EXPRESSIVE ASSOCIATION

Following on *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the Court in *Dale* set forth a framework for constitutional protection of expressive association. The membership decisions of an association cannot constitutionally be regulated if:

(1) the association is expressive, and

(2) the forced inclusion of an unwanted person in the association affects in a significant way the association's ability to express itself;

unless

(3) the regulation of the membership decision serves compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms.

Dale, 530 U.S. at 648-50; *Rotary*, 481 U.S. at 548-49; *Roberts*, 468 U.S. at 622-23.

A. Defining an Expressive Association

The right of expressive association is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622.

Law schools warrant consideration as expressive associations. The constituents of law schools clearly come together for "educational" purposes, if not also "political" and "social" ones. Certainly some students will be attracted to some law schools because of particular emphases in curricula or policies. Law schools seek to convey legal values to students, and that should serve to qualify them as expressive associations: "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 530 U.S. at 650.

What is also clear, however, is that employers seeking to interview students do not seek "inclusion" as members or constituents of law schools in any sense. In *Dale*, James Dale sought appointment as assistant scoutmaster for the Boy Scouts, a representative, leadership, and uniformed role within the organization. "During the time spent with the youth members, the scoutmasters and assistant scoutmasters

inculcate them with the Boy Scouts' values—both expressly and by example." *Id.* at 649-50. The issue was not James Dale's temporary physical presence in a Boy Scout building, but his proposed capacity "as an assistant scoutmaster" for Scouts. *Id.* at 654.

James Dale sought a role equivalent to that of a law school faculty member or an administrator of a private institution. Clearly, all schools are free not to hire or to terminate a faculty member or administrator who speaks or behaves inappropriately for a representative of the institution, although thresholds vary between public and private institutions. *See Hudson v. Craven*, 403 F.3d 691, 701 (9th Cir. 2005) (public community college justified in terminating economics instructor for attending World Trade Organization protests with students); *Jeffries v. Harleston*, 52 F.3d 9, 14-15 (2d Cir.) (public university justified in removing department chair as a result of off-campus speech that included derogatory statements about Jews), *cert. denied*, 516 U.S. 862 (1995); *Maguire v. Marquette University*, 814 F.2d 1213, 1217-18 (7th Cir. 1987) (Catholic university stated a valid reason for failing to hire professor with antithetical views on abortion).

The matter would be quite different if, for example, the law were to require that schools bestow honorary degrees on military recruiters or to require that schools include military recruiters as speakers in courses or panel discussions. Law schools cannot be required to place recruiters in representative or pedagogic positions. But that is not the case here.

Dale is not implicated because military recruiters and other employers do not seek to become anything akin to

members, leaders, or representatives of law schools. Employers represent only themselves when they appear at the appointed date and time to see interested students. Employers are outsiders, not insiders. Thus, associational interests are unaffected.

B. The Interference Test

In *Dale*, as in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), before it, the Court adopted a deferential view of what constitutes interference with associational rights. In *Dale*, the Court held that the inclusion of James Dale "as an assistant scoutmaster would . . . surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," even if the Boy Scouts' purpose was not to disseminate a belief with respect to homosexuality. 530 U.S. at 654. "[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655.

Similarly, in *Hurley* the Court held that the parade organizers for the St. Patrick's Day Parade had the right to exclude the Gay, Lesbian and Bisexual Group as a parade contingent marching behind a banner. 515 U.S. at 566. Despite the fact that "the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation," the Court held that "the parade organizers had a right to exclude certain participants nonetheless." *Dale*, 530 U.S. at 655.

However, this deferential standard was applied in situations where there was an expectation of a necessarily expressive role for the party seeking inclusion in the organization.

In both *Dale* and *Hurley*, the persons seeking inclusion sought to contribute their own views to the message of the organization. Dale sought to be "open" about who he was, and his admission into the organization as "an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform," *id.* at 655-56, would "*force the organization to send a message, both to the youth members and the world*, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," *id.* at 653 (emphasis added). Similarly,

> *a contingent marching behind the organization's banner would at least bear witness* to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would *suggest their view* that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals. . . .

Hurley, 515 U.S. at 574 (emphasis added).

Here, the evident goal of the party seeking inclusion needs to be considered. The military recruiters do not seek to send any message on the backs of law schools. They derive no moral authority from law schools when they participate with other employers in employer forums at law schools. They do not, in fact, seek any substantive relationship with law schools at all.

In addition, the organization's interest in the position being sought needs to be considered. In *Dale* and *Hurley*, there was irrefutable evidence that the Boy Scouts and the St. Patrick's Day parade organizers, in advance of the lawsuits, intended expressive roles for the positions sought. An assistant scoutmaster wears a leader's uniform and teaches Scouts, even if "only by example." *Dale*, 530 U.S. at 655. And the role of a parade contingent within the overall parade is clear: "[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Hurley*, 515 U.S. at 568. Each contingent contributes one aspect of the parade's expression.

However, here it cannot seriously be asserted that law schools intend employers to contribute to the law schools' expression in availing themselves of employer forums in law schools. Law schools do not seek to be identified with the potential employers, as a whole or individually. Law schools do not provide employers with a law school uniform or banner; military recruiters further distinguish themselves by wearing their own military uniforms.

Students are expected to differentiate between employers and make their own judgments. The opportunity to be judged as a potential employer *by adult students* is the only opportunity provided by law schools to employers, and it is all the military seeks here.

Finally, the result of the proposed "inclusion" here is distinctly different from that of *Dale* or *Hurley*. James Dale and GLIB could not be admitted to the Boy Scouts and to the St. Patrick's Day Parade halfway, and the speech of the former would become subsumed in the speech of the latter.

Here, however, because law schools and the military remain separate organizations with their own goals and expression, law schools may issue any statement they wish critical of the military or its policies. Law schools are free to continue or expand the speech they already propound on the topic of military policies.

C. Compelling State Interests

This Court has insisted that any attempt by the state to override First Amendment rights requires the state to establish that the public purpose sought to be achieved is not only facially legitimate, but "compelling" and unrelated to the suppression of speech. *See, e.g., United States v. Lee*, 455 U.S. 252, 256-61 (1982); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Healy v. James*, 408 U.S. 169, 184 (1972); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). In *Roberts*, the Court stated:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve *compelling state interests, unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational freedoms.

468 U.S. at 623 (emphasis added); *see Dale*, 530 U.S. at 648.

Given the weight of the constitutional priority of the Congressional power to raise an army against the questionable First Amendment interest involved here, there is no more suitable case in which to find a compelling state

interest. However, reliance on the compelling state interest exception in associational cases is fraught with peril. Local governments are often insensitive to constitutional limitations on their powers as it is, and bald reliance on a compelling state interest argument by this Court might serve to bolster local governments in squelching expressive rights. For the small-minded, there is always a compelling reason for a statute to trump Free Speech or for the Establishment Clause to trump Free Speech if the goal is "beneficent." *See Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.").

In *Dale*, the Court held that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." 530 U.S. at 659. The Court distinguished *Roberts* and *Rotary* on the fact that the enforcement of the statutes in those cases did not "materially interfere with the ideas that the organization sought to express." *Id.* at 657. Thus, under *Dale*, a statute invalidated on the basis of the interference test would seem to fail the state interests test automatically because application of the statute had been deemed "'[]related to the suppression of ideas.'" *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623).

Conversely, as in this case, a statute with a legitimate purpose that survives the interference test also seems likely to survive the state interests test. Certainly here, the military's interest in the Solomon Amendment is compelling. In addition, as discussed above, enforcement of the Solomon Amendment "would not materially interfere" with law school speech and thus should pass muster as "unrelated to the

suppression of ideas." However, because interference with or suppression of speech often lies in the eye of the beholder, this *amicus* believes that it would greatly improve the precedential value of this case to make explicit an additional aspect of a "compelling" state interest that was implicit in distinguishing *Dale* from *Roberts* and *Rotary*.

Consideration of what constitutes a compelling state interest should include consideration of the nature of the activity being regulated. State regulation that leads to the expansion of economic activities such as employment opportunities deserves greater deference. *Roberts*, *Rotary*, *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), and similar cases are most instructive when viewed in this light. *See Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460-62 (1978). While the state's interest in regulating organizations grows with the increase in the organization's ability to control access to commerce or employment, the state's interest becomes far weaker when charitable activities or social recognition are the issues, as was the case in *Dale*.

The outcome of inclusion of military recruiters here is that students have access to a greater number of potential employers. The Solomon Amendment is aimed at hurdles erected by law schools between interested students and a major employer and serves to open opportunities for career advancement. Thus, apart from the military's interests, an interest in the expansion of employment opportunities for students favors the government's case here as well.

II. THE PUBLIC FORUM ANALOGY

The law schools in this case should be viewed as having created an open forum for employers to interview interested students analogous to the public forums identified in First Amendment cases. Facilitators of forums do not intend to speak through the individual participants in forums and, therefore, do not have a right to veto the speech of individual participants on the basis of distinctions which are "not 'reasonable in light of the purpose served by the forum.'" *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) (quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 806 (1985)).

In *Rosenberger*, the University of Virginia had set up a Student Activities Fund ("SAF"), paid for by students, to support a broad range of extracurricular student activities that were "related to the educational purpose of the University" and that "tend[ed] to enhance the University environment." *Id.* at 824. Eleven categories of student groups qualified for SAF funds, including "student news, information, [and] opinion." *Id.* However, religious and political activities were specifically excluded. In the 1990-1991 academic year, 135 student groups applied for SAF funds, and 118 received those funds. Of the 118, 15 were funded as student news organizations. *Id.* at 825. When the student publisher of a Christian magazine, Wide Awake Productions, attempted to use the SAF to pay its printing costs as a student news organization, it was excluded as a "religious activity." *Id.* at 827.

This Court invalidated the exclusion of Wide Awake Productions from the forum, noting that once the University opened a forum dealing with certain subject matter, it "must

respect the lawful boundaries it has itself set" with respect to that subject matter. *Id.* at 829. The University may regulate content if it preserves the purposes of the forum, but it may not engage in viewpoint discrimination against perspectives on subject matter otherwise "within the forum's limitations." *Id.* at 830. The Court quoted *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), which held that a school district violated the First Amendment when it permitted school property "'to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint.'" *Id.* at 830 (quoting 508 U.S. at 393). The Court also relied on *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court struck down a public university's exclusion of religious groups from use of school facilities made available to all other student groups.

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted [it] to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . .
>
> It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. *A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech. . .*

> . . . Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

Rosenberger, 515 U.S. at 833-35 (emphasis added).

This Court has come to similar conclusions in the private context as well, when owners by design or by practice have created forums. The clearest cases concern cable companies and the public access channels they were required to carry in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), which this Court contrasted in *Hurley*, 515 U.S. at 575-77, as well as the shopping center in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *Turner Broadcasting*, the "must carry" policy, which conditioned a license on granting access to speakers who might or might not agree with the cable company, did not impose an unconstitutional condition on the cable company's speech. The Court found that "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." 512 U.S. at 655.

In *PruneYard*, the requirement that the shopping center permit student protestors to exercise rights of free expression and petition on shopping center property did not amount to an unconstitutional infringement of its owner's free speech rights. The shopping center—by choice of its owner—was not limited to the personal use of its owner but was instead open for others to use. 447 U.S. at 87. As a result, "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not

likely be identified with those of the owner." *Id.* Moreover, the shopping center and its owner were not "being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers." *Id.* at 88.

Similarly here, law schools have created an open forum for employers to interview and recruit interested students. There is no substantive expressive message that law schools seek to make through maintenance of these forums. *See Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (D.C. 1987) (en banc) (awarding gay student group access to physical privileges of forum available to other student groups in Catholic university under antidiscrimination statute, but not awarding official university recognition).

Furthermore, "nondiscrimination" as a qualification for participation in the forum can only serve to preclude *unlawful* discrimination if the qualification is to have any genuine and nonarbitrary meaning.[2]

In the First Amendment context, the only constitutional interpretation of a "nondiscrimination" requirement is the preclusion of unlawful discrimination. If the University of

2. When applied to *lawful* employment criteria or constitutionally protected membership criteria, the term "discrimination" is merely name-calling. This use of the term is a moral judgment that has no legal import. It was used by the court of appeals here in describing military policy in order to lend credibility to an unsound decision. Similarly, in rulings against Boy Scouts, courts have used the term to denigrate Boy Scouts' constitutionally protected views in order to justify violating its rights.

Virginia's excuse for excluding Wide Awake Productions had been the forum's "nondiscrimination" exhortation, rather than the Establishment Clause, the result of *Rosenberger* would be the same. Wide Awake Productions published Wide Awake magazine as a form of "philosophical and religious expression" to foster a "tolerance of Christian viewpoints" and to unify Christians of multicultural backgrounds. 515 U.S. at 825-26. Atheists and Wiccans would not qualify as the editors. Certainly, Wide Awake Productions had an associational right to the selection of Christian leadership, just as a La Raza student group would have a right to the selection of Hispanic leadership. No "nondiscrimination" requirement can interfere with that right. *Dale* at least stands for this proposition, if not *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981), and *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), before it. *See Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir.), *cert. denied*, 519 U.S. 1040 (1996); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996).

Here, the military's employment policies are entirely lawful, and the military's participation in an open forum which is facilitated but not substantively regulated by law schools does not affect law school speech. Facilitators of forums do not speak through individual participants, and thus cannot be said to be responsible for the speech of individual participants.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be reversed.

Dated: July 18, 2005

Respectfully submitted,

DAVID K. PARK
NATIONAL LEGAL COUNSEL
BOY SCOUTS OF AMERICA
1325 Walnut Hill Lane
Irving, TX 75015
(972) 580-2000

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

SCOTT H. CHRISTENSEN
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006
(202) 721-4600

Attorneys for Amicus Curiae
Boy Scouts of America

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IN THE
Supreme Court of the United States

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, ET AL.,

Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF ROBERT A. BURT, ET AL. ON BEHALF OF RESPONDENTS

PAUL M. DODYK
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Counsel of Record

DAVID N. ROSEN
400 Orange Street
New Haven, CT 06511
Telephone: (203) 787-3513

DANIEL SLIFKIN
ALMA HADAR
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000

Counsel for Amici Curiae

September 21, 2005

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INTEREST OF AMICI

Amici comprise a majority of the faculty of the Yale Law School ("Faculty Members").[1] Twenty-seven years ago, the Faculty collectively adopted a Nondiscrimination Policy, which committed the Yale Law School to stand against discrimination based upon sexual orientation. That policy grew out of Faculty Members' deep conviction that neither the Law School's educational mission nor their own individual consciences would tolerate teachers assisting deliberate discrimination against their own students.

For nearly three decades, the Faculty applied this Nondiscrimination Policy to give access, but not active assistance, to any employers who insisted upon discriminating against Yale Law students in their hiring practices based on sexual orientation. The Faculty Members believed that the Yale Law School should not exclude any speaker from speaking or prevent any point of view from being aired within the School. Accordingly, the Faculty Members have never interfered with willing employers and willing job applicants who want to meet on the Law School campus. But the Yale Law School does not aid and abet discrimination or assist outside employers who seek to hire some Yale students, but not others, based on their race, gender, religion, or sexual orientation.

In 2002, the Department of Defense ("DOD") invoked the Solomon Amendment (codified at 10 U.S.C. § 983) and threatened to cut off more than $300 million in Yale's federal funding if the Faculty Members did not change their long-standing policy. Rather than abandon their Nondiscrimination Policy under such coercion, Faculty

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[1] A list of amici appears in an appendix hereto. This brief has not been authored in whole or in part by counsel for a party and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Written consents to the filing of briefs by amici curiae have been filed in the Office of the Clerk of the Supreme Court by all parties to the proceeding.

Members filed the case of *Robert A. Burt et al. v. Donald H. Rumsfeld* in the United States District Court for the District of Connecticut, challenging the legality of the Defense Department's interpretation of the Solomon Amendment. Following extensive fact-finding, the Hon. Janet C. Hall: (1) entered final judgment on behalf of the Faculty plaintiffs; (2) declared the DOD's threats to deprive Yale University of some $300,000,000 in federal funding an unconstitutional application of the Solomon Amendment in violation of the Faculty Members' rights under the First Amendment to the United States Constitution; and (3) enjoined the DOD from making any further financial threats against Yale University.[2] Judge Hall's judgment confirmed that the DOD had: (1) unlawfully invaded the Faculty Members' constitutionally protected freedom of association; (2) unconstitutionally suppressed the Faculty Members' right to disassociate themselves from the DOD's discriminatory recruitment practices; and (3) failed to introduce any evidence of harm to its recruiting efforts resulting from the Faculty Members' Nondiscrimination Policy.

In *Rumsfeld v. Forum for Academic and Institutional Rights* ("FAIR"), the Government now denies that it has invaded academic freedom or coerced faculty, and claims that the Faculty Members' efforts to protect their own gay, lesbian, and bisexual students against discrimination have undermined military recruitment efforts in a time of national emergency. Amici submit this brief to show that these claims are false.

First, the DOD's actions have trampled upon the Faculty Members' academic freedom. The DOD's effort to conscript the Yale Law School faculty in its policy of open and deliberate discrimination offends the fundamental values of the Yale Law School, and any law school. The Faculty

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[2] The decision of Judge Hall is reported at 354 F. Supp. 2d 156 (D. Conn. 2005) and is reproduced at p. A1 of the Appendix to the Faculty Members' Petition for Writ of Certiorari ("App.") which is currently pending before this Court. (No. 04-1434).

Members object not to the mere presence of military recruiters, but to being forced to assist the military in telling some Yale Law students that they are not fit to serve in our country's armed forces because of their sexual orientation. The Faculty Members deeply respect those who serve in our nation's armed forces. They find both demeaning and stigmatizing Petitioners' insistence upon excluding Yale's gay, lesbian, and bisexual students from those forces. The DOD's demand that Faculty Members not just tolerate, but actively aid and abet, their discriminatory recruitment practices undermines the Faculty Members' commitment to maintain a tolerant and inclusive educational environment for all Yale law students. For the Faculty now to surrender to the Government's coercion—even to protect the University's finances—would inevitably erode all students' faith in the Faculty Members' commitment to treat them with equal respect and dignity.

Second, by threatening Yale and other law schools with massive defunding, Petitioners seek to prevent any law professors from disassociating themselves from the military's campaign of open discrimination against gays, lesbians and bisexuals. But in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and its progeny, this Court has repeatedly affirmed that private associations have a First Amendment right to disassociate themselves from, and thereby to protest against, the conduct of other private or public organizations. Had the NAACP received government funds, no one would argue that the Government could use that financial lever to coerce the NAACP to abandon its core mission through forced association with Claiborne Hardware's racially discriminatory practices. In the same way, the Government should not now be allowed to use its money to coerce Yale Law Faculty Members into associating with its discriminatory hiring practices against some Yale law students.

Third and finally, the facts found by Judge Hall in the *Burt* case prove that the DOD has, at all times, had ample access to Yale Law School students for its legitimate recruitment purposes. In *Burt*, the only Solomon

Amendment case to date to reach final judgment, the trial court found that Petitioners had introduced no evidence to show that the Law School's Nondiscrimination Policy of giving access but not assistance had adversely affected the DOD's recruiting at the Law School. The *FAIR* Petitioners offer no reason why subjecting Yale and other law schools to financial blackmail is either helpful or necessary to the military's efforts to recruit a sufficient number of lawyers into the uniformed services.[3]

The Yale Law School is an equal opportunity employer and fully supports any employer who offers equal opportunity. But when the Government tries to force law teachers who believe in equal opportunity to endorse discrimination, those teachers can and should resist. Neither the Solomon Amendment, nor the Constitution, authorizes our military to recruit lawyers by invading the academic freedom of teachers or forcing them to associate with practices that are inconsistent with their core values, particularly when such coercion serves no legitimate military need.

STATEMENT OF FACTS

I. THE YALE LAW SCHOOL'S NONDISCRIMINATION POLICY PROTECTS GAYS, LESBIANS, AND BISEXUALS FROM ALL FORMS OF DISCRIMINATION.

As Judge Hall found, the Yale Law School faculty adopted a Nondiscrimination Policy in 1972, barring discrimination on the basis of religion, race, sex or national origin. (App. A15). In 1978, the Yale Law School faculty

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[3] Indeed, the United States Army General Counsel recently proposed that the number of active-duty, uniformed lawyers working in the Judge Advocate General Corps be slashed from 1500 to 500. *See* Jill Schachner Chanen, *JAG Edge: Proposed Changes for Military Lawyers Have Critics at Attention*, 89-Nov. A.B.A. J. 26 (2003).

extended the protection of that policy to gays, lesbians, and bisexuals. *Id.*

The Nondiscrimination Policy provides:

> "Yale Law School reaffirms its policy against discriminatory employment practices. The law school does not countenance any form of discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, sexual orientation, or the prejudice of clients. Accordingly, all employers utilizing its placement services are required to abide by this policy. Employers who violate this policy will face sanctions." (Petition for Writ of Certiorari, *Burt v. Rumsfeld*, No. 04-1434 ("*Burt* Pet.") at 10).

The Nondiscrimination Policy governs all aspects of the Law School's activities, including appointments, admissions, housing, scholarships—and recruitment. (App. A15). The Nondiscrimination Policy requires all employers seeking to use the services of the Law School's Career Development Office ("CDO") to sign a pledge affirming their adherence to the Law School's Nondiscrimination Policy. *Id.*

It is the official policy of the DOD to discriminate against gays, lesbians, and bisexuals. *See* 10 U.S.C. § 654(b)(1-3). DOD representatives have refused to sign the pledge since 1978 and cannot use the services of the CDO. (App. A20).

The Yale Law School faculty members guide their students toward appropriate careers in the legal profession and attempt to ensure that all of their students have access to the broadest range of professional opportunities possible, free from discrimination. The Faculty Members have delegated the performance of some of their duties to the CDO. The CDO manages interview programs through which employers can interview Yale Law School students. The CDO maintains information provided by employers for review by

students, provides a means for students to transmit resumes to employers and schedules interviews, which are held at a nearby private hotel to avoid disruption of the Law School's activities. (*Burt* Pet. at 9).

Because of their continuing discrimination against gays, lesbians, and bisexuals, military recruiters did not use the services of the CDO from 1978 to 2001. But pursuant to the Law School's policy of providing access but not assistance to employers who refuse not to discriminate, throughout those years military recruiters have been provided with access to students and information sufficient for recruitment needs. Under the arrangements between the Law School and the DOD, the Law School provides military recruiters with information concerning the students' identity, addresses and education, as well as contact information which enables military recruiters to communicate with all students by mail, phone and the internet. (App. A20-21). Using that information, the DOD can communicate directly with Yale law students by email, advertising their openings and receiving applications by email. Military recruiters are free to schedule interviews with interested students at the private hotel at the same time that other employers are interviewing Yale law students. *Id.* They are also free to initiate contact with student organizations and meet with any interested students at the organization's invitation at any available space on the Yale campus. *Id.*

The DOD accepted these arrangements and conducted interviews at the Law School without protest for over 20 years, from 1978 to 2001. *Id.* In 2001, the DOD abruptly discarded those earlier arrangements and insisted that the Faculty Members exempt military recruiters from their Nondiscrimination Policy. *Id.*

II. THE DOD HAS SUPPRESSED THE LAW SCHOOL COMMUNITY'S NATIONWIDE PROTEST OF THE MILITARY'S DISCRIMINATION AGAINST GAYS, LESBIANS, AND BISEXUALS.

Yale's policy led increasing numbers of American law schools to adopt similar nondiscrimination policies protecting gays, lesbians, and bisexuals. After these practices became widespread, the American Association of Law Schools adopted a resolution in 1990 requiring all of its 166 members to withhold "any form of placement assistance or use of the school's facilities" from employers who discriminate against law students on the basis of race, religion, ethnicity, gender or sexual orientation. (Brief on the Merits submitted on behalf of the Department of Defense in *Rumsfeld v. FAIR,* No. 04-1152 ("DOD Brief") at 7.)

In response to the law schools' growing protest against the military's continuing discrimination against gays, lesbians, and bisexuals, Congress enacted the Solomon Amendment in 1994. In its current form, the Solomon Amendment empowers the DOD to withhold a broad range of federal funding from "institutions of higher education" if the "institution" or any "subelement of that institution" has a "policy or practice . . . that either prohibits, or in effect prevents" military recruiters from gaining access to campuses, to students on campuses, or to certain information deemed necessary for recruiting. (App. E1-2).

The legislative history of the Solomon Amendment makes it clear that the law was enacted in response to the limitations placed on military recruiters by the nation's law schools. During passage of the Amendment in 1994, Senator Nickles noted that "140 institutions of higher education . . . have denied military recruiters access to their campus[es]". 140 Cong. Rec. 15,500 (1994) (statement of Sen. Nickles).[4]

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[4] Although the legislative history does not specifically reference the law schools' stand against military discrimination, Senator Nickles' reference to "140 institutions" must refer to application of the nation's

Representative Pombo, a cosponsor of the Solomon Amendment, stated the sponsors' intention to "send a message over the wall of the ivory tower", and to tell universities that "their starry eyed idealism comes with a price". 140 Cong. Rec. 11,441 (1994) (statement of Rep. Pombo). Representative Solomon stated that Congress intended to:

> "tell . . . recipients of federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment rights. But do not expect Federal dollars to support your interference with our military recruiters." 140 Cong. Rec. 11,439 (1994) (statement of Rep. Solomon).

Despite the passage of the Solomon Amendment in 1994, the DOD continued for seven more years the *modus vivendi* for recruiting which had been worked out with the Yale Law School over the years since 1978. The DOD did, however, successfully seek amendments to the Solomon Amendment, expanding the scope of funds subject to the Amendment in 1997 (Pub. L. No. 104-208, § 514, 110 Stat. 3009-271 (1996) (codified at 10 U.S.C. § 983(d)(1))), and extending the defunding to the entire "institution of higher learning" if "any subelement of such institution" (*i.e.*, law school) denied recruiting services to the DOD in 1999. Pub. L. No. 106-65, § 549 (1999) (codified at 10 U.S.C. § 983(b)). In adopting these amendments, Congress never considered any empirical information showing that the law schools' nondiscrimination policies were actually impeding the DOD's recruitment efforts at the nation's law schools.

In 2001, in an abrupt reversal of policy, the DOD began insisting that Yale provide military recruiters not only with the access necessary for recruitment, but also with the active assistance given to other employers that adhered to the Law

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law schools' nondiscrimination policies because there was no other significant relevant activity during that period at the nation's universities.

School's Nondiscrimination Policy. (*Burt* Pet. at 12). The DOD insisted that military recruiters be afforded access in a manner that is "at least equal in quality and scope" to that offered to employers that subscribed to the Nondiscrimination Policy. *Id.* The DOD's actions left no doubt that it was threatening to withdraw $300 million of federal funding in an effort to suppress the perceived message sent by Yale's policy.[5] As the DOD itself concedes, the DOD's threats against Yale were part of its nationwide campaign to suppress the law schools' application of nondiscrimination policies to military recruiters. (DOD Brief at 8).

The DOD succeeded. By 2003, virtually every law school in the nation had been forced to exempt military recruiters from their nondiscrimination policies. *Id.* To avoid depriving their colleagues of some $300,000,000 in annual funding, a majority of the Yale Law School faculty voted to suspend application of the Nondiscrimination Policy to military recruiters until they could vindicate their constitutional rights in court. (App. A22).

In 2003, the United States District Court for the District of New Jersey suggested that the DOD's insistence that military recruiters be treated in a manner equal in quality and scope to nondiscriminating employers exceeded the authority conferred on the DOD by the Solomon Amendment. *Forum for Academic & Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269, 321 (D.N.J. 2003). In order to increase pressure on the nation's law school community, the DOD

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[5] After protracted correspondence, Acting Deputy Undersecretary for Military Personnel Policy, William J. Carr, sent a letter, dated May 29, 2003, to Yale University President Richard Levin that flatly declared that "Yale's policy is in violation of federal law". (App. A23). The Carr letter complained that the Faculty Members' *application of the Nondiscrimination Policy to military recruiters "sends the message that employment in the Armed Forces of the United States is less honorable or desirable than employment [elsewhere]."* *Id.* (emphasis added). The letter made it clear that the DOD would deprive Yale University of $300,000,000 in federal funding unless the Faculty Members stopped applying the Nondiscrimination Policy to military recruiters. *See id.*

returned to Congress and secured legislation overturning Judge Lifland's decision (as the DOD concedes, DOD Brief at 5-6; App. A20 n.16). Without holding hearings or issuing any factual findings, the Congress amended the Solomon Amendment by adding equality in quality and scope language to the statute. Pub. L. No. 108-375, § 552, 118 Stat. 1811 (2004) (codified at 10 U.S.C. § 983(b)(1)).

As a result of the DOD's coercive threats, the faculty of the Yale Law School, under duress, allowed military recruiters to use the services of the CDO from the fall of 2002 until the spring of 2005. (App. A22). Yet during that time—in which it received both access and assistance from Yale's CDO—the DOD did not succeed in hiring a single Yale law student contacted through the CDO. *Id.* At the same time, the Army General Counsel announced a proposal to dramatically reduce his recruitment of military lawyers. *See supra* note 3, (reporting U.S. Army General Counsel Steven Morello's announcement that "he planned to cut the number of active-duty uniformed Judge Advocate General Corps personnel to 500 from 1500".)

The Faculty Members filed their action, *Burt v. Rumsfeld*, in the United States District Court on October 16, 2003. On January 31, 2005, Judge Hall entered final judgment declaring the DOD's actions in applying the Solomon Amendment to Yale University unconstitutional and enjoining the DOD from making financial threats for the purpose of coercing the Yale Law School faculty to abandon application of their Nondiscrimination Policy to military recruiters.

ARGUMENT

I. THE DOD HAS VIOLATED THE FACULTY MEMBERS' RIGHT TO ACADEMIC FREEDOM

The Faculty Members are dedicated to the teaching of the law and the values central to the law. Among these values is the principle that all persons are to be treated with equal respect and dignity, irrespective of their race, ethnicity, religion, gender or sexual orientation.

The Faculty Members believe that a tolerant and inclusive environment is essential for all students to achieve their potential as members of the bar, bench and academy. They believe that protecting their students from all forms of discrimination occurring under law school auspices is necessary to maintain this environment and to encourage all students to participate fully and freely in the discussions which form the core of their education, without exposure to any discrimination which may inhibit or marginalize them.

The Faculty Members believe that protection against discrimination must be extended to all activities occurring under law school auspices—including recruitment. Since the DOD openly and deliberately discriminates against gays, lesbians, and bisexuals, the Faculty Members believe that the DOD's recruitment and hiring practices offend the core values of the Yale Law School. The Faculty Members object in the strongest possible terms to the DOD's effort to conscript the Faculty Members and the CDO, acting under faculty supervision, to aid the military in implementing their discriminatory practices under Law School auspices. The Faculty Members object, not to the mere presence of military recruiters, but to being forced to assist the military in acts that tell some of their students that they are not fit to serve in our country's armed forces because of their sexual orientation.

The Faculty Members support and respect all persons who serve in the armed forces, but believe that the opportunity to serve must be open to all persons irrespective of race, ethnicity, religion, gender or sexual orientation. The military's exclusion of Yale's gay, lesbian, and bisexual students burdens these students with a demeaning and stigmatizing judgment.

For the Faculty Members to assist or associate with the military's discrimination against their gay, lesbian or bisexual students—particularly for financial reasons—will inevitably erode the students' trust in the Faculty Members' commitment to treat them with equal respect and dignity. It will necessarily damage the Faculty Members' attempt to create an inclusive and tolerant atmosphere in which students

can express their views freely and fully without fear of marginalization, whether they are African-American, or women, or Jewish, or Muslim, or gay, or lesbian, or bisexual.

This Court has consistently held that the First Amendment rights of free speech and association endow academic freedom with heightened constitutional protection. As the Court explained in *Sweezy v. New Hampshire*:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation." 354 U.S. 234, 250 (1957).

The Supreme Court has consistently reaffirmed the principle that academic freedom has long been viewed as "a special concern of the First Amendment". *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). Only two years ago, this Court again reemphasized "our tradition of giving a degree of deference to a university's academic decisions". *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

This deference extends not only to what and how the faculty teaches, but more broadly to the faculty's freedom to govern its university's affairs. As the Court held in *Regents of the Univ. of Mich. v. Ewing*:

> "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also ... on autonomous decision making by the academy itself". 474 U.S. 214, 226 n. 12 (1985) (citations omitted).

See also Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 232 (2000) (upholding a mandatory fee supporting extracurricular student activity and deferring to the university's judgment about what speech "is or is not

germane to the ideas to be pursued in an institution of higher learning").

The principle of academic freedom enshrined in the First Amendment clearly protects the Nondiscrimination Policy that the Yale Law School faculty members have followed since 1978. The Faculty Members adopted that policy to protect all of their students from any form of discrimination, reasoning that such protection is necessary to preserve a tolerant and inclusive academic environment. The coercive intrusion of the DOD's discriminatory practices into the Law School community tramples upon the Faculty Members' academic freedom.

II. THE DOD HAS SUPPRESSED THE FACULTY MEMBERS' FREEDOM OF ASSOCIATION

The Faculty Members refuse to assist or to associate with the DOD's discrimination against their gay, lesbian, and bisexual students in hopes that one day, all of their students can pursue military service based on merit and free from discrimination. In applying their Nondiscrimination Policy to military recruiters, the Faculty Members are exercising a constitutionally protected right to disassociate from and to protest the military's discrimination.

This Court has long recognized that "freedom of association ... plainly presupposes a freedom not to associate". *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). In *Claiborne*, this Court held that the freedom not to associate provided constitutional protection for the actions of the NAACP in organizing a boycott of merchants in Port Gibson, Mississippi who discriminated against African-Americans. The Court held:

> "In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association and petition, though not identical, are inseparable.... This Court has recognized that expression on public issues has always rested on the highest rung

> of the hierarchy of First Amendment values." 458 U.S. at 911, 913 (quotation marks and citations omitted).[6]

The Court's decision in *Claiborne* makes it clear that the First Amendment fully protects the Faculty Members' refusal to cooperate with or assist, to disassociate from, and thereby to protest against, the military's discrimination against their gay, lesbian, and bisexual students. Yet the Government's brief in *FAIR* nowhere mentions this Court's decision in *Claiborne*, which clearly holds that acts of disassociation such as those before the Court are in and of themselves acts protected by the First Amendment. Nor does the DOD make any attempt to deal with this Court's cases extending First Amendment protections to academic freedom and according deference to "autonomous decision making by the academy". *Ewing*, 474 U.S. at 226 n.12. Nor, finally, does the DOD even mention that the cases before this Court arise out of the DOD's suppression of a nationwide protest against the military's continuing discrimination against gays, lesbians, and bisexuals.

In short, the DOD ignores what this case is really about. The Faculty Members' actions in disassociating themselves from the military's discrimination form an integral part of the nation's law schools' efforts to rid the legal profession of base discrimination against gays, lesbians, and bisexuals. That act of disassociation is part of a broader national effort to ensure that gays, lesbians and bisexuals are treated with equal dignity and respect throughout our society.

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[6] *See Thornhill v. Alabama*, 310 U.S. 88 (1940) (striking down as unconstitutional an Alabama statute which prohibited picketing designed to encourage workers to withhold their labor from an employer); *Missouri v. National Organization for Women ("NOW")*, 620 F.2d 1301 (8th Cir. 1980) (voiding the application of state tort law to penalize NOW's boycott of Missouri related to the Equal Rights Amendment); *see also Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979); *Mechasky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *Kirkland v. Wallace*, 403 F.2d 413 (5th Cir. 1968).

The military, the Boy Scouts and some religious institutions continue to openly and deliberately discriminate against gays, lesbians, and bisexuals. But the nation's law schools, virtually all of the nation's law firms, and many employers and religious institutions have taken actions designed to eliminate such discrimination from their institutions and from our society. In this case, the Faculty Members do not ask this Court to accept their view that gays, lesbians, and bisexuals should be accorded the same dignity and respect as all other citizens. They ask only that, as in other cases, this Court protect their freedom to express those views through a constitutionally protected right of disassociation. *Cf. Dale*, 530 U.S. 640 (protecting the right of disassociation when exercised to discriminate against gays, lesbians, and bisexuals); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (same).

If, as the Faculty Members believe, their decision to disassociate themselves from the military's discrimination is itself an act protected by the First Amendment, most of the DOD's arguments become irrelevant. First, the fact that the Faculty Members could express their opposition to the military's discrimination against gays and lesbians by some other means is irrelevant. In *Claiborne*, the NAACP could equally have taken out an advertisement in the Port Gibson newspaper deploring racial discrimination by local merchants, but that fact in no sense suggests that the NAACP lacked a protected right to boycott those merchants—and hence to disassociate themselves from their racist activities. Of course, the Faculty Members retain their freedom to speak, but that is no justification for depriving them of their constitutionally protected freedom of association.

Nor does it make any difference *whose* speech is involved when a military recruiter tells a Yale law student that her sexual orientation renders her unfit to serve in the armed forces. The Faculty Members' right to disassociate themselves from the military's discriminatory recruitment and employment practices is in no way dependent on anything that any particular interviewer might say in any

particular interview. If the DOD's coercive threats violate the Faculty Members' right of disassociation, it does not matter if those threats are deemed in some sense to be "government speech" under the recent expansion of that doctrine in *Johanns v. Livestock Mktg. Ass'n*, __U.S.__, 125 S. Ct. 2055 (2005).

Nor does it matter that students and others will not likely attribute the DOD's discrimination to the Yale Law School. The point of *Claiborne* is that the act of disassociation is, itself, a powerful tool of expression and protest deserving of constitutional protection. The Faculty Members have a constitutional right to disassociate themselves from governmental practices they deem immoral, whether those practices are attributed to them or not.

Similarly, the DOD seeks to brush aside this Court's holdings in *Dale* and *Hurley*, which recognize the First Amendment protection afforded to private associations that express themselves by exercising their rights to disassociate.[7] The DOD would limit *Dale* to: (1) cases involving membership in an association; and (2) cases where the presence of an unwanted member may result in an attribution of that member's views to the association. (DOD Brief at 18-25). But as *Claiborne* makes clear, neither limitation applies

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[7] The Faculty Members believe that the *Dale* case was wrongly decided because it upheld the Boy Scouts' ability to discriminate against Mr. Dale based on his mere presence and sexual orientation, as opposed to his conduct. The Faculty Members look forward to the day when the law's protections of our citizens' rights to equal respect and dignity will be accorded to gays, lesbians, and bisexuals as they have been to other historically disfavored minorities. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("prejudice against discrete and insular minorities" "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" and hence legislation that affects such minorities "may call for a correspondingly more searching judicial inquiry"). But if *Dale* and *Hurley* articulate the Court's current views concerning the relationship between an institution's freedom of association and its right to disassociate from activities which conflict with its values, those views must be as fully applicable to law schools as they are to the Boy Scouts.

when a group exercises its right to disassociate itself from another institution whose practices it finds offensive to the association's values. The merchants who were boycotted by the NAACP and its supporters were obviously not members of the NAACP. Nor did the NAACP's right to boycott those merchants rest on the potential attribution of the merchants' racial views to the NAACP. *See Claiborne*, 458 U.S. 886.

In any event, Mr. Dale's mere presence did not intrude more deeply on the Boy Scouts' core values than has the DOD's coercive conscription of Yale's assistance in discriminatory recruitment. As Justice Stevens pointed out in *Dale*, no one claimed that Mr. Dale was proselytizing or advertising his sexual orientation when serving as a Boy Scout leader. 530 U.S. at 689-91 (Stevens, J., dissenting). Nevertheless, Mr. Dale's mere presence was deemed sufficient to trigger the Boy Scout's right to exclude him. By contrast, in the *Burt* case, the Faculty Members are attempting to prevent the actual commission under Law School auspices of discriminatory acts that demean their gay, lesbian, and bisexual students—acts explicitly condemned by the Yale Law School's Nondiscrimination Policy. Coercing the Faculty Members' cooperation in such discriminatory conduct damages the Yale Law School's values far more than Mr. Dale's mere presence damaged the Boy Scouts.

In *Dale*, this Court said: "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression". 530 U.S. at 653. This Court should similarly defer to Yale's Nondiscrimination Policy, which leaves no room for doubt as the Faculty Members' views:

> "Yale Law School reaffirms its policy against discriminatory employment practices. The Law School does not countenance any form of discrimination . . . ". (*Burt* Pet. at 10).

There is no basis for this Court to apply a narrower concept of a law faculty's right to disassociate from discriminators

than it has applied to those who choose to discriminate against gay, lesbian, and bisexual persons.

Finally, this Court's decisions in *Sweezy*, *Bakke*, *Ewing* and *Grutter*, *supra*, all recognize that academic freedom is a matter of special concern of the First Amendment and that deference should be accorded to the autonomous decision-making by the academy. These decisions clearly mandate judicial deference to the Faculty Members' judgment that they must disassociate themselves from the military's discriminatory recruitment practices to protect the core values of the Yale Law School.

III. THE DOD FAILED TO INTRODUCE ANY EVIDENCE THAT ITS RECENT COERCIVE CONDUCT IS NECESSARY TO ACHIEVE ANY GOVERNMENTAL PURPOSE.

In *Burt v. Rumsfeld*, Judge Hall found that the DOD had failed to introduce any evidence that its recent coercive conscription of CDO services was necessary to achieve any governmental purposes. She held:

> "Here, DOD has offered no proof that the Solomon Amendment is the least restrictive means by which the Congress can successfully raise and maintain an effective military .... Despite the fact that any information on military recruiting successes and failures is uniquely within the control of the military, DOD has offered no evidence that either (1) the number of recruits it obtained prior to the suspension [of the Yale Law School's Nondiscrimination Policy ("NDP")] was insufficient, or (2) that implementation of the Solomon Amendment, in the form of the suspension of the NDP, has increased, or is even likely to increase the number of those recruits. In fact, the only reference made to any success or failure of recruiting in this litigation is the military's admission that in the more than two years the NDP has been suspended, it has obtained

> only one recruit and that this recruit did not come to the military via the CDO program." (App. A44, A46).

The DOD introduced no evidence in either the *Burt* case or the *FAIR* case that its recent coercive conduct has furthered any legitimate interest in recruiting lawyers. For more than twenty years—including seven years after the Solomon Amendment was passed—the DOD recruited law students at the Yale Law School and law schools throughout the country under arrangements which permitted access and information sufficient for legitimate recruiting needs. (App. A15-24). During that time, the DOD did not coerce law schools to abandon the evenhanded application of their nondiscrimination policies to all employers. At no time during the enactment or subsequent modification of the Amendment were any findings made by Congress that could establish that the DOD's suppression of the law schools' protest against military discrimination was either (1) necessary to attain a compelling government interest (as required by *Dale*, 530 U.S. at 659); or (2) the minimum restriction of First Amendment freedoms necessary to further a governmental interest (as required by *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

In the cases now before this Court, the DOD introduced no evidence that its recruiting of lawyers was either inadequate before its recent coercive conduct, or improved because of it. To the contrary, as Judge Hall found, the only evidence in the *Burt* case proved that the DOD's coercion resulted in no benefit to the Government's recruiting efforts. (App. A45-46).

The DOD's failure of proof means that its recent coercive conduct cannot be justified, whether one applies the strict scrutiny test applied by *Dale*—that the conduct constitutes the least restrictive means of achieving a compelling government interest—or the test applied by *O'Brien*—that the restriction of First Amendment freedoms be "no greater than essential to the furtherance of the governmental interest". 391 U.S. at 377.

Judge Hall correctly decided that the DOD's conduct in these cases is subject to strict scrutiny. (App. A41-46, A54-55). The DOD offers no principled distinction between these cases and *Dale*, in which this Court held that "the intermediate standard of review set forth *United States v. O'Brien* . . . is inapplicable". 530 U.S. at 659. The DOD's actions in forcing the Faculty Members to exempt the military from its Nondiscrimination Policy affects their associational rights in a manner at least as direct and immediate as the impact of Mr. Dale's mere presence in the Boy Scouts. Nor can the DOD escape strict scrutiny by drawing a line between "speech" and "conduct", because the conduct in these cases—the Faculty Members' disassociation from and protest against military discrimination—is itself an activity protected by the First Amendment. *See, e.g., Claiborne*, 458 U.S. 886; *Thornhill*, 310 U.S. 88; *Missouri v. NOW*, 620 F.2d 1301.

In its Brief, the DOD relies on three arguments to justify its recent coercion. First, relying solely on Justice O'Connor's opinion in *United States v. Albertini*, 472 U.S. 675 (1985) (a case involving access to military bases), the DOD asserts that all it need prove is that recruiting was more effectively achieved by its conscription of law school recruiting services than by the less intrusive methods previously followed. (DOD Brief at 35-36). But as Justice O'Connor has elsewhere written, citing *Albertini*, when the Government acts to suppress First Amendment values "the availability of less intrusive approaches to a problem serves as a benchmark for assessing reasonableness of the fit between Congress' articulated goals and the means chosen to pursue them". *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 253 (1997) (O'Connor, J., dissenting) (quoting *Albertini*, 472 U.S. at 689).[8]

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[8] *Albertini* arose from Mr. Albertini's prosecution for violating an order he had received barring him from entering the Hickam Air Force Base because he had vandalized military property during an earlier visit. *See* 472 U.S. 675. Nothing in the Court's decision upholding that

Second, the DOD asserts that its recent conduct is justified by Congress's judgment that "the military's recent success in recruiting talented high school and college candidates was 'in large part due to recruiting on school campuses'". (DOD Brief at 35-36) (quoting 140 Cong. Rec. 11,438 (1994)). But on its face, this statement refers to the recruiting of high school graduates and college students, not lawyers. Although the statement was made in 1994—sixteen years after the Yale Law School began denying military recruiters assistance through its recruiting services—it makes no claim that such practices harmed military recruiting of JAG lawyers. Most important, the statement clearly cannot support any claim that the DOD's recent coercive conduct at the Yale Law School is "no greater than essential to the furtherance of the [DOD's] interest". *O'Brien*, 391 U.S. at 377.

Third, the DOD asserts that "the Solomon Amendment relies on the educational institutions' own assessments of what is required for effective recruiting . . . ". (DOD Brief at 40). But the Yale Law School directs employer recruiting to a hotel off campus not to optimize employers' effective recruiting, but to limit employers' disruption of the Law School's educational mission. As described above, from 1978 to 2001, the Yale Law School and DOD followed a *modus vivendi* whereby DOD successfully recruited Yale students by having access, but not active assistance, from the Law School's Career Development Office. The DOD has made no factual showing why this *modus vivendi* did not serve, or could not be made to serve, all of the DOD's legitimate recruiting aims.

In sum, the DOD's recent suppression of the law schools' disassociation from military discrimination against gay, lesbian, and bisexual students is far more restrictive than necessary for achieving governmental objectives. Whether

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prosecution suggests that the DOD is not obligated to ensure that actions impinging on First Amendment values be no greater than essential to furtherance of the governmental interest.

under the test in *O'Brien* or under the more searching standard of *Dale*, the DOD has utterly failed to show that it has taken all available steps to minimize its intrusion into Faculty Members' constitutional rights.

CONCLUSION

Neither the Solomon Amendment nor the First Amendment authorizes our military to invade academic freedom, to force law schools to associate with the military's discriminatory practices, or to use coercive tactics that are unnecessary for effective military recruiting. For the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit in *FAIR v. Rumsfeld* should be affirmed.

September 21, 2005

Respectfully submitted,

PAUL M. DODYK
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Counsel of Record

DAVID N. ROSEN
400 Orange Street
New Haven, CT 06511
Telephone: (203) 787-3513

DANIEL SLIFKIN
ALMA HADAR
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000

Counsel for Amici Curiae

Appendix A

List of Amici

Amici, each of whom is a member of the faculty of the Yale Law School, are as follows:

Robert A. Burt
Owen M. Fiss
Harold Hongju Koh
Kenji Yoshino
Bruce Ackerman
Anne L. Alstott
Ian Ayres
Jack M. Balkin
Yochai Benkler
Richard R.W. Brooks
Amy L. Chua
Morris L. Cohen
Dennis E. Curtis
Harlon L. Dalton
Drew S. Days III
Brett Dignam
Steven B. Duke
William N. Eskridge, Jr.
Daniel C. Esty
Daniel J. Freed
Robert W. Gordon
Michael J. Graetz
Oona A. Hathaway
Dan M. Kahan
Paul W. Kahn
Jay Katz
S. Blair Kaufman
Alvin K. Klevorick
Anthony T. Kronman
Carroll L. Lucht
Daniel Markovits
Jerry L. Mashaw
Jean Koh Peters
Robert C. Post
J.L. Pottenger, Jr.
Judith Resnik
Carol M. Rose
Susan Rose-Ackerman
Vicki Schultz
Reva Siegel
John G. Simon
Robert A. Solomon
Stanton Wheeler
Stephen Wizner

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,
Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE CATO INSTITUTE IN SUPPORT OF RESPONDENTS

MARK K. MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

GREGORY S. COLEMAN
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

DIANE HARVEY
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8781

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the court of appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, publication of the *Cato Supreme Court Review*. The instant case raises squarely the question of the limits of the federal government's power when seeking to intrude upon a private institution's First Amendment rights to freely associate and advocate its views and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

SUMMARY OF ARGUMENT

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion." *W. Va. Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943). Petitioners do not directly reject that proposition. But even if the government does not tell law schools what to think, it certainly considers itself an expert on how law schools should be run. Its briefs and

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[1] In conformity with Supreme Court Rule 37, amicus has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. Amicus also states that counsel for a party did not author this brief in whole or in part, and no person or entities other than the amicus, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

those of its amici fairly groan under the weight of high-handed advice instructing respondents about how to educate their students. *See* Pet. Br. at 20 (suggesting that opposition to the Solomon Amendment is inconsistent with the "function of institutions of higher education" to "expose students to a wide range of views"); *id.* at 21 (suggesting students are "mature" enough to distinguish the recruiters' views from that of the institution); *id.* at 22 (suggesting that compliance with the Solomon Amendment will pose "no difficulty" in conducting law schools' pedagogical functions). *See also* Brief Amicus Curiae of Law Professors and Law Students in Support of Petitioners at 5-6 (suggesting that respondents' policies "severely compromise" student interests and frustrate the "core mission" of an academic institution).

In *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), this Court expressed grave doubts about the ability of nine justices to second-guess the quality and degree of expressive interests asserted by expressive associations. *Id.* at 651-53. It should apply similar skepticism to petitioners' dismissive attitude toward the interests asserted by respondent law schools here. Just as it is no business of the Court, or the state, to tell private law schools what their message should be, it is also no business of the Court, or the state, to tell law schools how to best convey their message.

The "message" at issue here is, of course, education about the value of a particular principle of non-discrimination, conveyed through a gentle symbolism: The respondent law schools exclude from their campus hiring a powerful employer who would discriminate against their students. It is a message that speaks without words or the use of force, but is as clear as any commandment of the Old Testament: As you do, you will have done to you. That policy of expressive moderation is, moreover, supported by important educational

considerations: chief among them the need to instruct effectively without polarizing the campus and alienating close-minded students who need instruction most. Speech codes and harangues promote resistance and rebellion. Symbolism and subtlety, a respondent might bet, open minds and shape norms.

Petitioners' logic, which denies First Amendment protection to respondents because of the supposedly marginal nature of the expressive interests at issue, would impose upon those law schools committed to expressive moderation a strange choice: between (1) abandoning the form of instruction chosen, or (2) denouncing the disfavored views with unrelenting—and, in their view, ineffective—hostility. It is a "freedom" to be quixotically strident, but not to be calculatingly measured. That is a supremely odd outcome given that the First Amendment is designed to promote, above all, the free *exchange* of ideas. *See, e.g.*, *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2004) (First Amendment embodies "[o]ur profound national commitment to the free exchange of ideas") (citation omitted). It is also an outcome expressly forbidden by *Boy Scouts of America* v. *Dale*. 530 U.S. at 656. ("[t]he fact that the organization does not trumpet its views from the housetops . . . does not mean that its views receive no First Amendment protection").

Agree or disagree with respondents' view of how to educate, their associational assessment is beyond the competence of this Court to assess. Here, once the Court accepts, as it must, respondents' reasonable claim to the Court's recognition of an important interest in pursuing their chosen manner of educational message formation, the Court should also recognize that no countervailing government interest remotely worthy of equivalent respect has been identified by petitioner. Where, as here, there are less restrictive means to accomplish the government's purpose (*i.e.*, loan repayment programs, television and

radio recruiting campaigns), coercive regulations like the Solomon Amendment cannot withstand strict scrutiny.

ARGUMENT

In 2003, the Forum for Academic and Institutional Rights ("FAIR"), a group of law schools and law school faculties, sued the Department of Defense and other federal agencies seeking a preliminary injunction enjoining enforcement of the Solomon Amendment. The district court denied FAIR's application for a preliminary injunction, reasoning that FAIR was not likely to establish that the Solomon Amendment was unconstitutional.

The Third Circuit reversed, correctly holding that the Solomon Amendment (1) improperly compels the law schools to use their personnel and resources to disseminate the military's recruiting message, and (2) interferes with the law schools' voluntary right of association by preventing the law schools from teaching "by example" that discrimination on the basis of sexual orientation is wrong. *Forum for Academic & Institutional Rights* v. *Rumsfeld ("FAIR")*, 390 F.3d 219 (3d Cir. 2004). Because the Third Circuit properly concluded that the Solomon Amendment impaired the law schools' First Amendment rights, the court applied strict scrutiny, which required the court to determine if "the Government's interest in recruiting military lawyers is compelling, and . . . whether the Solomon Amendment is narrowly tailored to advance that goal." *Id.* at 234-35, 242. Given the sparse record before it, the Third Circuit appropriately concluded that the government failed to produce "a shred of evidence that the Solomon Amendment materially enhances its stated goal"; "the Solomon Amendment," it said, "could barely be tailored more broadly." *Id.* at 234-35.

The Third Circuit also properly held that the Solomon Amendment amounted to an inappropriate penalty on

protected speech and associational rights. That, too, was correct: Under the unconstitutional conditions doctrine, the government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially his interest in freedom of speech.'" *Id.* at 229 (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). That doctrine is a sensible application of a simple common sense observation: The federal government's ever expanding power to disburse benefits is more than a contractual bargaining chip. Here, wielded disproportionately and in a way that is designed to achieve by indirect pressure outcomes the Bill of Rights is designed to prevent, it is a weapon.

The Court of Appeals therefore correctly concluded that Congress could not condition the law schools' receipt of nearly all of their federal funds, despite a complete absence of any nexus between funds and targeted conduct, on the law schools' surrender of control over their methods of associational expression.

I. THE LAW SCHOOLS ASSERT PROTECTED ASSOCIATIONAL RIGHTS.

A. BROAD FIRST AMENDMENT PROTECTION OF EXPRESSIVE ASSOCIATION IS ESSENTIAL TO OUR SYSTEM OF ORDERED LIBERTY.

As has long been recognized by this Court, the First Amendment is "the indispensable condition, of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.). The theory of the First Amendment is that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

As a consequence, for over forty years, this Court has recognized an individual's right under the First

Amendment to freely associate in order to advance shared ideas. *See NAACP* v. *Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). Focusing upon the close link between free speech and free assembly, the *Patterson* Court determined that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.*

Protecting the freedom to associate secures two key benefits. First, it "preserv[es] political and cultural diversity and . . . shield[s] dissident expression from suppression by the majority." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). Second, by ensuring wide dissemination of information, the First Amendment exposes error and allows individuals and government to avoid unsound ideas more effectively and efficiently, illuminating ideas that might otherwise be ignored. *See, e.g.*, Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 557-58 (1991) ("The First Amendment is based on the belief that people will make better decisions if they are more fully informed . . . [and that] [n]ormally, the availability of greater information can only benefit economically rational individuals—the more information individuals have, the more knowledgeably they can define their ends, calculate their means, and plan their actions.").

To secure these benefits, the First Amendment rejects a "paternalistic approach" to governance of the marketplace of ideas. *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); Farber, 105 Harv. L. Rev. at 557 n.15. To control the effects of bad speech, the First Amendment therefore counsels not more government, but a larger constellation of private speech producers.

While the government and its amici pretend to take the side of free speech, contending that the Solomon Amendment ensures student access to a greater quantity of information than would exist in its absence (*see, e.g.*, Pet. Br. at 20 (suggesting that opposition to the Solomon Amendment is inconsistent with "expos[ing] students to a wide range of views")), its position is patently paternalistic. In the judgment of Department of Justice lawyers and their amici, members of Congress and the executive branch understand how to maximize the contribution of individual private educational associations to the public welfare much better than the private professional educators whose interests are at issue here. *See* Brief Amicus Curiae of Law Professors and Law Students in Support of Petitioners at 5-6 (suggesting that respondents' hostility to the policies reflected in the Solomon Amendment "severely compromise" student interests and frustrate the "core mission" of an academic institution). Legal protection for the "marketplace" of ideas rests on a different presumption: that the combined efforts, tactics, and resulting collision of a multitude of individual private sector speakers and associations, not the ministrations of official overseers, will maximize the quality and diversity of information available to the informational marketplace. The Amendment reflects a common sense economic insight: Even well-intentioned regulation of the process of exchange may distort the marketplace for speech, just as it does for other goods—not only by giving state-preferred competitors an unwarranted subsidy but, just as often, by irrationally distorting the speech marketplace in ways unforeseen by regulators, benefiting no one.

B. FAIR ASSERTS SUBSTANTIAL FIRST AMENDMENT INTERESTS.

1. FIRST AMENDMENT PROTECTIONS FOR EXPRESSIVE ASSOCIATION INCLUDE PROTECTION FOR ORGANIZATIONAL STRUCTURE AND AUTONOMOUS MESSAGE FORMATION.

In *Boy Scouts of America* v. *Dale,* this Court held that a private non-profit organization constituted an expressive association and noted that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups . . . . Associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." 530 U.S. 640, 648, 655 (2000). As *Dale* made clear, so long as a law "significantly affect[s]" an association's "expression," the law cannot be applied to that association unless it is the "least restrictive means" of "serv[ing] compelling state interests." *Id.* at 655.

The fundamental tenets of associational freedom are not confined to cases where expressive associations seek to exclude members the association believes do not reflect its values and beliefs, a point first underscored in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). The *Hurley* Court determined that a state's public accommodation statute, which prohibited discrimination with respect to sexual orientation, should not restrict a private group's decision to prohibit gay marchers in its St. Patrick's Day parade. According to the Court, the parade was "a form of expression, not just motion," even though there was not a "succinctly articulable message." *Id.* at 568-69. Thus, the Court emphasized that First Amendment protection

extends not only to a parade's "banners and songs . . . for the Constitution looks beyond written or spoken words or mediums of expression." *Id.* at 569. The Court, in other words, acknowledged that the First Amendment protects the association's delivery of its message even if it is symbolic expression and not a spoken word. Consistent with *Hurley*, *Dale* recognized that "[g]overnment actions that may unconstitutionally burden" the freedom of association "may take *many* forms, *one* of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'" 530 U.S. at 648 (citation omitted) (emphasis added).

Dale and *Hurley* thus established that the freedom to associate, if it is to secure a meaningful right to translate principles into concerted action and influence, must include the freedom from any governmental conduct that seeks to intrude upon the internal structure or affairs of the association. That right logically includes, at a minimum, an association's right: (1) to freedom of autonomous message formation, (2) to unfettered delivery of the group's message, (3) to define itself and its members, (4) to choose who shall speak on behalf of the group and who shall not, and (5) to exclude competing messages that might dilute the group's chosen expression or values.

2. Courts Owe Deference To Law Schools' Identification Of Structural Expressive Interests.

In *Dale*, the Court not only recognized that rights of associational freedom extend beyond membership, to organizational structure, but also recognized that an expressive association's assessment of the expressive interests at stake deserves deference. Which mode of expression will be the most effective for a given association must be determined not by the Court but by

the association itself. *See Meyer* v. *Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.").

a. In *Dale*, this Court rejected the New Jersey Supreme Court's attempt to second-guess the expressive interests asserted by the Boy Scouts. In effect, the New Jersey Supreme Court argued that the Scouts did not deserve First Amendment protection because the Scouts had not been hostile *enough* to homosexual scouts. The Scouts did not expressly disapprove of homosexuality, limiting their official statements on matters of sexual orientation to a series of "empty moral bromide[s] devoid of substantive content." Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119, 120 (2000). While it had indeed excluded a few token individual scoutmasters based on their avowed sexual orientation, the Boy Scouts "rarely, if ever, denie[d] membership based on any selection criteria other than age or gender." *Dale* v. *Boy Scouts of America*, 734 A.2d 1196, 1234 (N.J. 1999). Indeed, neither the "charter nor bylaws . . . permit[ted] the exclusion of any boy." *Id.* at 1234-35. Moreover, the organization's official policy directed scoutmasters to eschew formal discussion of sexuality because the Scouts "believe[d] that boys should learn about sex and family life from their parents." *Id.* at 1203. In fact, affidavits of hundreds of scouts stated that they were wholly "unaware of any [Scout] position on the morality of homosexuality." *Id.* at 1240. Based on the "inconsistency and vagueness" of the Scouts' official line on matters of sexuality, the New Jersey Supreme Court denied the Scouts First Amendment protection, holding that to gain the benefit of free speech protections it must show a "clear, particular, and consistent message" of animus to homosexuality. *Id.*

On appeal, this Court sensibly rejected the New Jersey's Supreme Court's approach, ruling that "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection." *Dale*, 530 U.S. at 656. "As we give deference to an association's assertions regarding the nature of its expression," reasoned Chief Justice Rehnquist's majority opinion, "we must also give deference to an association's view of what would impair its expression." *Id.* at 653. "If the Boy Scouts wish[] Scout leaders to avoid questions of sexuality and teach *only by example*," concluded the Court, "this fact does not negate the sincerity of its belief expressed above." *Id.* at 653, 655 (emphasis added). *Dale* did not, in other words, second-guess the Boy Scouts' chosen form of pedagogy.

An opposite result, of course, would have been perverse. The Boy Scouts' vague policy on homosexuality reflected a considered, and quite reasonable, organizational policy: "a studied compromise" between competing factions that "a large and successful organization must make to stave off schism or disintegration." Epstein, 74 S. Cal. L. Rev. at 128. By refusing to second-guess the organizations' asserted expressive interests, the Court therefore avoided playing "havoc with the position of [a] mainstream institution who [would have been] put to an unnecessary choice: voice extreme positions or choose moderate ones and forfeit [its] right to manage [its] internal affairs." *Id.* at 127.

b. Here, despite *Dale*'s counsel of humility, petitioners and their amici take the position that the law schools' recruiting policies are merely incidental to the law schools' expressive interests and thus not entitled to any First Amendment protection. *See, e.g.*, Pet. Br. at 20 (suggesting that opposition to the Solomon Amendment is inconsistent with the "function of institutions of higher

education" to "expose students to a wide range of views"); *id.* at 21 (suggesting students are "mature" enough to distinguish the recruiters' views from that of the institution); *id.* at 22 (suggesting that compliance with the Solomon Amendment will pose "no difficulty" in conducting law schools' pedagogical functions). *See also* Brief Amicus Curiae of Law Professors and Law Students in Support of Petitioners at 5-6 (suggesting that respondents' policies "severely compromise" student interests and frustrate the "core mission" of an academic institution). Petitioners ask, in effect, the Court to substitute its judgment about how to educate students for that of the respondents.

Much like the Boy Scouts, respondents have chosen a moderate mode of educational expression. It is a mode of expression that does not penalize disfavored views expressed within the student body. It does not shame and marginalize student speakers whose campus speech is disfavored. Instead of proscriptions and expulsions, it employs a gentle symbolism to convey respondents' chosen message. Rather than target students, it targets a societally powerful outside employer. And it does so by fighting fire with fire, discriminating against that employer, by barring it from using associational property to solicit students in a discriminatory fashion. Like the Scouts, respondents' educational strategy teaches "by example." *Dale*, 530 U.S. at 653, 655.

The respondents' associational policies, again like those of the Scouts, are supported by an eminently reasonable associational strategy. A law school may bet that coercion and harangues (*e.g.*, speech codes and professorial rants) polarize and divide, inciting rebellion among dissenting students and closing, rather than opening, resistant minds. Instead, that law school may opt for a soft touch, betting symbolism will plant seeds more effectively, by defusing the hostility that often poses an

insuperable barrier to transforming deep-seated societal norms. It is an educational strategy at least as worthy of deference as the Boy Scouts' judgments about how to best regulate its expressive message.

By denying recognition of a valid First Amendment interest because of respondents' expressive moderation, petitioners would force on law schools committed to expressive moderation a choice no less perverse than the choice the New Jersey Supreme Court would have forced on the Boy Scouts: express disapproval of disfavored views in an extreme manner or choose expressive moderation and forfeit First Amendment protection. Respondents and other law schools would be left with a "freedom" to be (from one pedagogical point of view) ineffectively strident but not to be calculatingly measured in expression.[2]

c. The risks of adopting the government's dismissive attitude toward the First Amendment interests expressed here underscore the stakes of this case. Any constitutional principle worthy of the name must occupy a sizeable field. Yet, if petitioners have their way, the rights of expressive association recognized in *Dale* and similar cases would accord only formal rights to "associate." Their reasoning would preserve the rights of individual members of associational groups to speak their mind (which, of course, they had before they entered the association); but, by denying the association a broad and unconditioned right to control the organization's resources when implementing its strategy of choice, the protection would ultimately fray at the point organizations translate

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[2] Conditioning First Amendment protection on the clarity and strength of expression is also patently inconsistent with this Court's First Amendment protection of the right *not to speak at all*. *See* Section I.C, *infra*.

principles into concerted action. Indeed, petitioners' reasoning would, in some cases, provide a special bargaining endowment to the most hard-edged and doctrinaire members of associations in their battles over the direction of associational strategy, the exact result *Dale* sought to avoid.

C. Denying Recognition Of A Protected Expressive Interest In This Case Would Force Respondents To Subsidize Views With Which They Disagree.

Petitioners would not only deny the respondents the right to choose their own methods of expression, but would force respondents to subsidize speakers with whom they disagree—or, in the alternative, subsidize competitors in the educational marketplace who curry favor with government. That forced choice underscores that the Solomon Amendment inevitably, and unavoidably, coerces respondents to support speech inconsistent with their associational principles.

The First Amendment guarantees both "the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974), this Court applied that principle to hold unconstitutional Florida's "right of reply" statute, which required any newspaper that criticized the official record of a candidate for public office to print—free of charge—any reply the candidate might have to the critique. Similarly, in *Pacific Gas & Electric* v. *Public Utility Commission of California*, 475 U.S. 1 (1986), this Court held that California could not force a utility company to "assist in disseminating [a third party association's] message" by requiring the third party's message to be included on the utility's billing envelopes. *Id.* at 14-15. The Court reasoned that it was unconstitutional not only

to force the utility company to print the association's message, but that such compulsion could force the utility company to respond, potentially creating a second constitutional violation.

Here, the government seeks not only to force the law schools to forgo their message that discrimination in employment is wrong, it would create the situation where the law schools will be compelled to speak in order to counteract the government's message. *See* Pet. Br. at 22 & n.3 (noting that a fear of mistaken inference is self-imposed, since it may be corrected by "vociferous[]" criticism of government policy by, for example, "faculty members"). Not only would such a response constitute compelled speech, but the response itself could be viewed as violating the mandate of the Solomon Amendment by creating a situation in which the law schools' criticism of the hiring policy of the U.S. military, by fomenting hostility towards the military, would "prevent" the law schools from providing military employers with "access to students . . . at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1) (2005).

Nor does the "choice" to forgo funding save the Solomon Amendment from charges of "coercion." By forgoing funding, respondents are placed in the position of subsidizing *competitors* in the educational marketplace (for examples, *see, e.g.*, Brief of Amicus Curiae Law Professors and Law Students in Support of Petitioners) who hew to the government's party line. The wealth transfer is the product of a simple calculus: Respondents and their supporters must pay for educational subsidies in the form of taxable contributions. If they forgo drawing from the benefit pool in order to preserve their expressive rights, they are nonetheless forced to contribute to other schools' educational subsidies, through general tax contributions. But they no longer receive any benefit in

return; the result is a net gain for competing schools at respondents' expense. Thus, the Solomon Amendment creates the conditions for a transfer of wealth from respondents to third parties, no matter how respondents choose to respond to the choice it poses. Put simply, it creates a Hobson's choice, one that is inconsistent with legal protection against forced subsidization of speech.

D. THE SOLOMON AMENDMENT FAILS TO SURVIVE STRICT SCRUTINY.

Since the Solomon Amendment significantly affects the law schools' rights of expression, it is subject to strict scrutiny.[3] As noted in *Dale*, the freedom of expressive association can be trumped by a showing of "compelling state interests, unrelated to the suppression of ideas, that *cannot be achieved through means significantly less restrictive* of associational freedoms. *Dale*, 530 U.S. at 648 (internal citation omitted) (emphasis added). Accordingly, petitioners must establish that their trampling on respondents' First Amendment rights is justified by a compelling interest, here, recruiting military lawyers. In addition, petitioners must demonstrate that the Solomon Amendment is narrowly tailored to accomplish that interest.

The Third Circuit "presume[d] that the Government has a compelling interest in attracting military lawyers," *FAIR*, 390 F.3d at 234, and petitioners make much of

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[3] Wisely, petitioners do not argue that the Solomon Amendment could actually withstand strict scrutiny and instead confine their constitutional analysis to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). As the Third Circuit correctly concluded, however, as in *Dale*, "*O'Brien* is inapplicable" where the government action at issue "directly and immediately affects associational rights." *FAIR*, 390 F.3d at 244; *see also Dale*, 530 U.S. at 659.

Congress' authority to "provide for the common [d]efence and general [w]elfare." Pet. Br. at 15-16 (citing U.S. Const. art. I). But petitioners utterly fail to show that the Solomon Amendment is narrowly tailored to achieve such ends. Nor do petitioners establish that the Solomon Amendment is a necessary means of furthering that compelling interest. Indeed, the statements of certain members of Congress made during floor debate on the Solomon Amendment, *see, e.g.*, *FAIR*, 390 F.3d at 225-226 (recounting such statements as that of Congressman Pombo that Congress needed to "send a message over the wall of the ivory tower of higher education" that there is a price to be exacted for "starry eyed idealism"), clearly establish that the Amendment is nothing more than a pretext for penalizing respondents' First Amendment rights of association.

First, the Solomon Amendment is not by any means narrowly tailored to accomplish its goal. The Amendment, as amended in 2004, now requires educational institutions to provide military recruiters access to students and campuses "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1). And as respondents demonstrated below, the military has not limited its demands for access to that of a mere "periodic" visitor. For example, the military has demanded that the law schools disseminate the military's message by advertising through the law schools' various channels of communication. As the Third Circuit observed, the U.S. military has more than ample resources to recruit law students through means that would not infringe on the law schools' First Amendment rights, including through the use of attractive student loan repayment programs and direct media advertising. Yet petitioners fail to allege, much less establish through affidavit or evidence, a single fact that would support their

assertion that the law schools' enforcement of their non-discrimination policy "undermines the military's recruitment effort," *see* Pet. Br. at 17, sufficient to justify the use of "the [federal government's] power [to] violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

Petitioners have also failed to produce any evidence that the Solomon Amendment enhances the military's recruitment efforts. In fact, there is evidence that the reverse is true, as illustrated by the district court's observation that the Amendment has incited consistent and vocal protests in the educational communities since its inception. *See Forum for Academic & Institutional Rights, Inc.* v. *Rumsfeld*, 291 F. Supp. 2d 269, 315 (D. N.J. 2003). The Solomon Amendment simply cannot withstand a strict scrutiny analysis.

II. THE SOLOMON AMENDMENT IS AN UNCONSTITUTIONAL CONDITION.

A. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE IS APPLICABLE TO RESPONDENTS' FIRST AMENDMENT CLAIMS.

In *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the Supreme Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* at 597. The basis for this conclusion is that otherwise the government could create indirectly "a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited . . . . Such interference

with constitutional rights is impermissible." *Perry*, 408 U.S. at 597.

The "unconstitutional conditions" doctrine announced in *Perry* rightly recognizes that wealth transfers occasioned by government bargaining may result in distributions of wealth and power that the Bill of Rights is designed to foreclose. "[O]nce the government goes beyond its role as an enforcer of private rights to create and administer a system of positive welfare rights," the "greater scope of government action necessarily makes it easier for the state" to offend constitutional limits on its powers over individual choices. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 81 (1988). Under these circumstances, a "bargain that is made [by government] with one citizen may have the effect of freezing other citizens out of the market or setting them at a competitive disadvantage," skewing the marketplace in ways that the Constitution's positive restraints on state action are supposed to prohibit. *Id.* at 103.

The unconstitutional conditions doctrine therefore is necessary to ensure that government does not "'lever' its . . . advantage" in a way that alters the economic position of a discrete group of citizens within enclaves that are strictly protected from government manipulation by the Bill of Rights. *Id.* at 104. The goal, in First Amendment cases like this, is to ensure that the discretionary "lever" afforded by government disbursement of funding does not systematically "distort the outcome of the political process" in ways that should not be possible in a strict regime of government neutrality toward protected speech. *Id.* at 79.

Here, the Solomon Amendment achieves what the First Amendment is designed to foreclose: It selectively transfers wealth from one class of educational institutions

to a competing class of educational institutions based on the willingness of some of these institutions to forgo educational speech distasteful to government officials. As discussed (*see* Part I.C), the benefits at issue (a set of federal educational subsidies) are funded in part by the respondent law schools and their supporters. If the respondents refuse to admit military recruiters, they lose benefits but must continue to subsidize the provision of similar benefits to competitors. The Solomon Amendment thus effectively transfers wealth from a disfavored class of educational institutions to a favored class (including the schools of some of petitioners' amici). That wealth transfer skews the relative power of the two sets of institutions from what it would be in a benefit-free world.

Thus, while the Solomon Amendment concededly does not proscribe heterodoxy, the Amendment makes heterodoxy either (1) a steeply uncompetitive position in the educational market, if the Amendment's offer is declined or (2) largely ineffectual, in the view of respondents (*see* Part I.B.2), if the Amendment's offer is accepted. That choice, if allowed to reign unchecked, is inconsistent with meaningful First Amendment protection for associational and expressive freedom. *See* Epstein, 102 Harv. L. Rev. at 104 (the Court should "organize its thinking on unconstitutional conditions in particular and constitutional law in general around one proposition: where the Court routinely allows strategic behavior and implicit wealth transfers by government, there constitutionalism ends").

B. Application Of The Unconstitutional Conditions Doctrine Is Justifiable On Alternative Grounds.

Finally, while this case raises a First Amendment question, and amicus believes respondents' case is wholly

supportable on that basis, it also agrees that "[n]o theory of associational freedom that places speech on a pedestal and leaves other forms of collective behavior to the tender mercies of the state can endure." Epstein, 74 S. Cal. L. Rev. at 142. What the respondent law schools urge, in effect if not in fact, is a right not only to choose methods of expressive association, but a subsidiary right to exclude certain individuals from their facilities. Their argument underscores that the rights debated here "resonate[] . . . at least as well with the right to property and the rights of liberty generally," as they do with the right to speech and association. *Id.* at 141. Indeed, the two sets of rights are inextricably linked—and, in the long run, neither set of constitutional rights, nor the pluralism that they make possible, can live without firm, categorical judicial recognition of the other.[4] *See, e.g.*, Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003-2004 Cato Sup. Ct. Rev. 9, 10 (2004) ("[T]he Constitution—written and unwritten—protects both economic and non-economic liberty. Both are essential, and each supports the other.").

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[4] It is true that many of the respondent law schools have come to embrace these constitutional principles at a late hour and, it must be admitted, rather selectively. Even so, the consistency of a party's support for constitutional principle is not a touchstone for enforcement of that party's constitutional rights.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

MARK K. MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

GREGORY S. COLEMAN
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 4140
Austin, Texas 78759
(512) 349-1930

DIANE HARVEY
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8781

Counsel for Amicus Curiae

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Supreme Court of the United States

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, ET AL.,
Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY AND ALLIANCE DEFENSE FUND IN SUPPORT OF NEITHER PARTY

Gregory S. Baylor *(Counsel of Record)*
Steven H. Aden
CENTER FOR LAW & RELIGIOUS FREEDOM
OF THE CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane, Suite 222
Annandale, Virginia 22003
Tel.: (703) 642-1070

Counsel for Amici Curiae

July 18, 2005

QUESTIONS PRESENTED FOR REVIEW

The Solomon Amendment, 10 U.S.C. 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the court of appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF *AMICI CURIAE* INTEREST AND INTRODUCTION[1]

The **Christian Legal Society** ("CLS"), founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and many law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, including the rights of religious persons on the campuses of public colleges and universities.

Alliance Defense Fund ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations represent hundreds of thousands of Americans who have First Amendment rights on the campuses of public law schools, universities, and elsewhere. Its membership includes hundreds of lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools,* 533

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[1] *Amici curiae* file this brief by consent of the parties, and copies of the letters of consent are on file with the Clerk of the Court. Counsel for *amici* authored this brief in its entirety. No person or entity, other than the a*mici*, their supporters, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

SUMMARY OF ARGUMENT

Conspicuously absent from both the district court and appellate court's analyses of the First Amendment claims presented by Respondents is a consideration of whether and to what extent the rights of free speech and association are possessed by Respondent's members that are public educational institutions. The Court's *amici* believe that whatever the constitutional status of the Solomon Amendment may be with respect to private law schools, the analysis changes considerably when its application to public law schools is considered. This is particularly true in view of the status of public educational institutions as "marketplaces of ideas" that include numerous diverse individuals and associations whose rights of speech and association – including the right to express views contrary to those of their schools' official policies – are also subject to constitutional protection.

ARGUMENT

I. THE COURT OF APPEALS ORDERED THE DISTRICT COURT TO ENJOIN APPLICATION OF THE SOLOMON AMENDMENT NOT ONLY TO PRIVATE LAW SCHOOLS, BUT ALSO TO PUBLIC LAW SCHOOLS.

Challenging the Solomon Amendment in this case are the Forum for Academic and Institutional Rights (FAIR), the

Society of American Law Teachers (SALT), an association of students at Boston College Law School, an association of students at Rutgers Law School, three Rutgers law students, and two law professors.

FAIR, an association of law schools and law school faculties is the only plaintiff whose claims are before this Court. More precisely, as demonstrated below, only the claims of FAIR's *law school* members are before this Court.

In the district court, the government moved to dismiss the complaint on the ground that none of the plaintiffs had standing. *See Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F.Supp.2d 269, 276 (D. N.J. 2003). The district court denied that motion, concluding that all the plaintiffs – both the associational and individual plaintiffs – had standing to sue. *See id.* at 296. On appeal, the government conceded that FAIR had standing, and the Court of Appeals – fulfilling its obligation to confirm subject matter jurisdiction – agreed with the district court's assessment of FAIR's standing. *See Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 228, n. 7 (3rd Cir. 2004). The government did *not* concede that plaintiffs other than FAIR had standing, and the Court of Appeals did not examine their standing, concluding that the presence of at least one plaintiff with standing satisfied Article III. *See id.*

Just as the Third Circuit's standing inquiry did not reach the non-FAIR plaintiffs, its substantive First Amendment analysis did not independently consider the constitutional interests of individual law professors (participating in the case either through SALT or as individual plaintiffs) or of individual law students (either through the Rutgers association, the Boston College association, or as individual plaintiffs). Nor did it assess the constitutional rights of law school faculties in

their collective capacities (a number of which are members of FAIR). Instead, the Court of Appeals' analysis focused exclusively on the rights of law schools.

Among FAIR's members are public law schools. FAIR's website states that its membership includes six public institutions.[2] FAIR's by-laws do not limit membership to private schools, instead declaring that "[m]embership in the corporation is reserved for academic institutions (including, but not limited to, universities and colleges) and faculties of such institutions acting as a separate entity."[3] Other documents on FAIR's website confirm that public institutions are among its members. For example, in a document entitled "Questions & Answers About The Solomon Amendment Litigation," FAIR addresses whether the public nature of some law schools might change the constitutional analysis.[4]

The membership of six public law schools in FAIR is not the sole means by which public educational institutions are involved in and affected by this litigation. The plaintiffs asked the district court to declare that the Solomon Amendment violates the Constitution and to enjoin its enforcement.[5] The complaint seeks relief not only for the named plaintiffs and, in the case of associational plaintiffs, their members, but also for every educational institution subject to the Solomon Amendment. In addition, the secrecy of FAIR's membership list is consistent with the plaintiffs' desire for – and the Third Circuit's apparent requirement of – a blanket injunction.

The Third Circuit's disposition of the case almost certainly was intended to provide for the broad relief the plaintiffs sought. The Court of Appeals declared, "[w]e reverse and remand for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment."[6] 390 F.3d at 246. The Court of Appeals did *not* instruct the district court to limit the effect of its injunction to private law schools. The plaintiffs' attorneys agreed with this interpretation of the appeals court's instructions. In a "Questions and Answers" document on the FAIR website, they declare, "[w]e strongly believe that the injunction will be national in scope, *i.e.*, that it will protect every law school in the United States."[7]

At no point in this litigation have the parties or the lower courts turned their attention to the special questions raised by the presence of public law schools in this case. The *amici* believe that the governmental character of many of America's law schools is relevant to this Court's analysis.

II. Conferring Expressive Association Rights Upon Public Law Schools Will Undermine Genuine First Amendment Values.

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[2] *See* http://www.law.georgetown.edu/solomon/participating_schools.htm (last visited July 13, 2005).

[3] *See* http://www.law.georgetown.edu/solomon/documents/FAIRbylaws.pdf (last visited July 13, 2005), Art. I, § 2.

[4] *See* http://www.law.georgetown.edu/solomon/documents/FAIRQandA.doc (last visited July 14, 2005).

[5] *See* Plaintiffs' Second Amended Complaint, pp. 25-26.

[6] The Court of Appeals stayed the mandate pending this Court's consideration of this case. Therefore, the district court did not have an opportunity to execute the Third Circuit's instructions.

[7] *See* "Frequently Asked Questions About the Third Circuit's Decision in the Solomon Amendment Case (*FAIR v. Rumsfeld*)," Heller Ehrman White & McAuliffe, LLP, http://www.law.georgetown.edu/solomon/documents/FAIRvRumsfeldQA.pdf (last visited July 14, 2005).

FAIR contends that facilitating the recruitment efforts of the military – an employer that takes sexual conduct and orientation into account – undermines the ability of its members to communicate their disapproval of such employment practices to their students. Its members, which include six public law schools, claim that the First Amendment's Free Speech Clause shields them from congressional pressure to facilitate such recruitment efforts. *Public* educational institutions are claiming a free speech *right* to exclude speakers whose messages and practices they find disagreeable. *Public* law schools are claiming a constitutional *entitlement* to inculcate their students with their chosen perspective on a controversial political and moral question, and to do so by excluding others having a different view.

To be sure, the objectionable speaker in this case (the military) is itself a government entity, but nothing in the law schools' argument suggests that they would not invoke their alleged constitutional rights when pressured to accommodate *private* speakers whose messages and practices they condemn. In short, the public law school members of FAIR are asking this Court to grant them a constitutional *right* to instill their approved viewpoint in their students, and to do so by excluding those holding contrary perspectives. Both the goal and the chosen means of the public law schools are profoundly antithetical to the traditional understanding of the First Amendment's purpose.

It is not hard to imagine how public educational institutions – and perhaps other government agencies – might use their newfound constitutional "right" as a way to limit dissent, and to do so in the name of "inculcating values" in their students. Revisiting historical controversies suggests all too plainly how this new "right" would be employed if recognized by this Court.

In 1969, at the height of the controversy over American military involvement in Vietnam, students at Central Connecticut State College, a public institution, formed a local chapter of Students for a Democratic Society (SDS). *See Healy v. James*, 408 U.S. 169, 172 (1972). The president of the state college denied their request for official recognition as a campus organization in part on the ground that the group's "philosophy was antithetical to the school's policies." *Id.* at 175. The president declared that access to student group benefits "should not be granted to any group that 'openly repudiates' the College's dedication to academic freedom." *Id.* at 175-76. This Court rightly held that the college's decision violated the students' First Amendment rights. *Id.* at 194. *See also Hudson v. Harris*, 478 F.2d 244 (10th Cir. 1973) (anti-war group denied recognition by state college stated First Amendment claim for relief).

Although Central Connecticut State College offered numerous justifications for its action, at no time did it contend that the First Amendment gave it a *right* to deny recognition to the student group in order to better inculcate students in its preferred philosophy. However unthinkable such a contention might have been then, it is certainly "thinkable" today: each of FAIR's public law school members are claiming a First Amendment right to exclude a speaker whose practices are, in *Healy*'s words, "antithetical to the school's policies."

Decades ago, a number of public universities attempted to stifle fledgling student chapters of the American Civil Liberties Union. In the fall of 1969, a group of students at state-run Radford College in Virginia sought recognition of a campus ACLU chapter. *ACLU v. Radford College,* 315 F. Supp. 893, 894 (W.D. Va. 1970). The college required that the "purpose and practices" of student groups be consistent with "the broad

educational philosophy of Radford College." *Id.* at 894. In refusing to recognize the ACLU chapter, the faculty declared that the "role and purpose of the American Civil Liberty [sic] Union lies basically outside the scope and objectives of this tax supported educational institution." *Id.* at 898. The court held that Radford, as a state college, had violated the students' First Amendment rights. *Id.* at 899.

Suppose that Radford College possessed a First Amendment *right* to inculcate its students in its "broad educational philosophy" and its "scope and objectives" by excluding contradictory voices such as, in the eyes of Radford's 1969 faculty, the ACLU.[8] At the very minimum, the possession and assertion by Radford of such a right would have severely complicated the court's analysis of the ACLU's Free Speech Clause claims. If this Court were to recognize a free speech right of public educational institutions to exclude unwanted speakers, how will the lower courts adjudicate the free speech claims asserted *against* public institutions *by* those unwanted speakers? Whose First Amendment interests should be elevated, and whose should be subordinated?

[8] In the instant case, interestingly, the ACLU submitted a brief *amicus curiae* to the Court of Appeals supporting FAIR and the other plaintiffs. The ACLU brief failed to distinguish between FAIR's private and public law school members, thereby tacitly advocating the extension of First Amendment rights to government-run law schools. The ACLU's *amicus* brief filed in the Third Circuit can be found at http://www.law.georgetown.edu/solomon/Documents/GibbonsDelDeoACLU.pdf (last visited July 15, 2005). It is difficult to imagine that the ACLU would have supported the notion that Radford and the other universities that denied it recognition decades ago had a *constitutional right* to do so. *See also University of Southern Miss. Chapter of the Miss. Civil Liberties Union v. University of So. Miss.*, 452 F.2d 564 (5th Cir. 1971).

Further, granting public educational institutions a free speech right to convey their preferred messages by excluding disfavored outsiders could destabilize the well-settled law regarding the access of religious speakers to public fora. For decades, countless schools denied religious groups equal access to meeting space on the ground that permitting such access would violate the Establishment Clause. Typically, schools argued that granting religious speakers access would send an unwanted message: that the school endorsed or favored the religious group. They claimed that the receipt by the community of this unintended message – one contrary to the school's desired message of neutrality – resulted in an Establishment Clause violation. For example, in 1977, the University of Missouri at Kansas City denied a student religious group called Cornerstone access to meeting space on the ground that such access would cause students to believe that the university endorsed religion. *See Widmar v. Vincent*, 454 U.S. 263, 274, n. 14 (1981). Similarly, in 1985, administrators at Westside High School in Omaha denied Bridget Mergens' request for meeting space for a Christian club. *See Board of Educ. of Westside Comm. Schs. v. Mergens*, 496 U.S. 226, 232 (1990). They feared equal treatment would send a message of official endorsement of religion. *Id.* at 247. *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1990) (discussing fear that "the community would think that the District was endorsing religion"); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 841-42 (1995) (discussing "concern that [a student newspaper's] religious orientation would be attributed to the University"). Nevertheless, this Court consistently and repeatedly rejected governments' Establishment Clause justifications for denying religious speakers access to speech fora. *See generally Widmar v. Vincent*, 454 U.S. 263; *Board of Educ. of Westside Comm. Schs. v. Mergens*, 496 U.S. 226; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508

U.S. 384; *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819; *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

If this Court were to confer First Amendment rights upon FAIR's public law school members, one can imagine that certain public schools will deny some or all religious speakers – especially unpopular or controversial ones – access to speech fora on the ground that such speakers contradict or undermine some message the school intends to communicate to its students. For example, many public schools today attempt to instill in their students a spirit of tolerance and acceptance of various differences, including religious ones. Many religious speakers, understandably, contend that their own religious beliefs are true and that contrary religious beliefs are false. Although such a perspective is not necessarily incompatible with "tolerance" (rightly understood), it is not difficult to foresee a public school administrator concluding that such religious speech undermines the message of "tolerance and acceptance" the school communicates and hopes its students will embrace. Instead of invoking the Establishment Clause to justify the exclusion of the religious speaker, the school could instead raise its *own* free speech rights, setting up an unmanageable conflict between competing constitutional claims.

There is great irony in the public law schools' contention that they have a free speech right to protect the purity of their perspective on homosexuality by excluding military recruiters. In the 1970s and 1980s, it was the Free Speech Clause upon which homosexual student groups relied in successfully challenging public universities' refusal to recognize them. For example, a group called Gay Student Services filed a First Amendment lawsuit in 1976 against Texas A&M University, successfully challenging the school's refusal to recognize the

group. *Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317 (5th Cir. 1984). Texas A&M denied recognition on the ground that the purposes of the group were "not consistent with the philosophy and goals that have been developed for the creation and existence of Texas A&M University." *Id.* at 1320. *See also Gay Students Org. of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976) (Virginia Commonwealth University); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988) (University of Arkansas); *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558 (M.D. Ala. 1996) (University of South Alabama).

Over twenty years later, public law schools are claiming a constitutional *right* to exclude organizations whose purposes are "not consistent with the philosophy and goals" of the law schools. To be sure, many of the "philosophies and goals" of American higher education have changed in two decades. However, the wisdom of conferring a constitutional *right* upon public universities to protect their own preferred messages by excluding unpopular speakers has not: it was a bad idea then, and it is a bad idea now.

The "hot button" student groups on college campuses are no longer the ACLU, anti-war activists, or gay rights proponents. Instead, the vast majority of contemporary controversies center upon religious groups that take religion and moral conduct into account in selecting their leaders and voting members. Consistent with their treatment of military recruiters, many law schools have denied or revoked the recognition of religious student groups, on the ground that their leadership policies constitute religious and sexual orientation

"discrimination."[9] Law school chapters of the Christian Legal Society (CLS), a 44 year-old association of Christian lawyers, judges, law professors, and law students, have endured a relentless assault by law schools intolerant of their unpopular perspective on the morality of homosexual conduct or the relevance of religious belief. Just within the last three years, public university officials have threatened, de-recognized, or denied benefits to CLS law student chapters at Ohio State University, Washburn University, Arizona State University, University of California Hastings College of Law, the University of Iowa, the University of Toledo, and Southern Illinois University. Other religious student groups at the University of North Carolina, Penn State University, the University of Oklahoma, the University of North Dakota, and the University of Minnesota have confronted similar problems in the recent past.

Certain of these universities, including Ohio State, Washburn, Penn State, Toledo, and Minnesota, wisely amended their non-discrimination policies to respect the religious freedom rights of religious student groups, either before or shortly after litigation ensued. *See, e.g., Christian Legal Society Chapter of the Ohio State University v. Holbrook*, S.D. Ohio No. 2:04-cv-197; *Maranatha Christian Fellowship v. Regents of the University of Minnesota System*, D. Minn. No. 0:03-cv-05618; *Christian Legal Society Chapter of Washburn University School of Law v. Farley*, D. Kan. No. 5:04-cv-04120; *DiscipleMakers v. Spanier*, M.D. Pa. No. 4:04-cv-02229 (Penn State University); *Christian Legal Society Chapter of the University of Toledo v. Johnson*, N.D. Ohio No. 3:05-cv-07126. However, a number of universities have steadfastly refused to accommodate these groups' sincere religious beliefs and exercise, and are vigorously contesting the student groups' efforts to vindicate their constitutional rights in court. *See Christian Legal Society Chapter at Arizona State University College of Law v. Crow*, D. Ariz. No. 2:04-cv-02572; *Christian Legal Society Chapter of University of California, Hastings College of Law v. Kane*, N.D. Cal. No. 3:04-cv-04484; *Alpha Iota Omega Christian Fraternity v. Moeser*, M.D.N.C. No. 1:04-cv-00765 (University of North Carolina); *Christian Legal Society Chapter at Southern Illinois University School of Law v. Walker*, S.D. Ill. No. 4:05-cv-04070.

[9] The *amici* reject the contention that religious student groups commit "discrimination" by taking religious belief and conduct into account in choosing their leadership and voting membership. Properly understood, "discrimination" is the invidious reliance upon irrelevant characteristics. Religious groups' preservation of their religious character is not invidious; religious belief and moral conduct are not irrelevant. *Cf.* 42 U.S.C. §2000e(j) (exempting religious employers from Title VII's ban on religious discrimination in employment).

In each of these cases, unpopular dissenters are challenging the prevailing orthodoxies on their campuses. That they invoke ancient creeds and traditional mores instead of avant garde ideas matters not. The pivotal reality is that they disagree with the majority of their peers and, more importantly, those who wield power on campus. The notion that the First Amendment should be a weapon in the hands of the powerful to stamp out the last remaining vestiges of dissent is nothing short of repugnant.

By its own admission, FAIR's law school members are intent on convincing each and every one of its students that participation in homosexual conduct is morally acceptable. They concede that one purpose of their non-discrimination policies is to pronounce values "that law faculty hope students will internalize" and that students "will follow in their law

practices and lives as community leaders." Second Amended Complaint, ¶ 24. *See also id.*, ¶ 1 (the "message" sent by discriminatory recruiters "violates the core values they inculcate in their students"); ¶ 7(g) (FAIR member school "believes that the assistance it provides to the military undermines the message it is trying to inculcate in its students"); ¶ 8(b) (non-discrimination policies "forcefully send a vital message of the values embraced by SALT members and SALT members' law schools to students"); ¶ 10 (policies are "directed at inculcating values"); ¶ 22 (a "message of diversity and tolerance is communicated by law schools" through non-discrimination policies"); ¶ 24 (non-discrimination policy "has substantive pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures"); ¶ 29 (application of non-discrimination policy to military is "entirely expressive in purpose and effect"). Their policies are less about protecting homosexual students from discrimination than about instilling this message.

Yet, they do not stop there. They inculcate this message by communicating a further message: that any *disapproval* of homosexual conduct is *itself* immoral. Moreover, their response to such disapproval – a competing message – is to suppress and stifle it. In their opposition to the petition for a writ of certiorari, FAIR stated, "[t]he lesson the law school wants to inculcate is that employers who discriminate should *not* be treated the same as those who do not." Cert. Opp. at 17. *See also* Second Amended Complaint ¶ 1 (message sent by discriminatory employers is one "they abhor"); ¶ 2 (through their non-discrimination policies, law schools "make a statement that invidious discrimination is a moral wrong and impart that view to their students"); ¶ 3 (consideration of sexual orientation in employment decisions is, "in the estimation of law faculties nationwide, invidiously discriminatory"); ¶ 21 ("Judgments based solely on … creed,

… religion, … or sexual orientation have no place in the law school environment").

FAIR contends that the government's efforts to insure military recruiters' access to campus are *not* about filling JAG spots with the best lawyers, but instead a response to a perceived "slap in the face." FAIR's complaint about the military's alleged abuse of its power for cultural, political, and ideological reasons rings hollow, given that its law school members are doing *precisely* the same thing to their CLS chapters. FAIR claims that "the only battle Congress and the Armed Forces are waging in this instance is a *Kulturkampf*." Cert. Opp. at 28. This contention is nothing but a stone thrown from a glass house; a *Kulturkampf* is the only battle the law schools are waging against their CLS chapters.

The effort of law schools to produce graduates with a uniform viewpoint on the morality of homosexual conduct is particularly troubling given the thoroughly unresolved character of the national debate regarding homosexuality. Although the plaintiffs are convinced that sexual orientation discrimination is as morally repugnant as race discrimination, huge numbers of their fellow Americans disagree. A wealth of evidence reveals that the law schools' position on homosexuality is deeply controversial. For example, neither the federal government nor 34 states have enacted police power statutes forbidding sexual orientation discrimination in employment.[10] The federal government enacted the Defense of

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[10] *See* 42 U.S.C. § 2000e-2(a)(1) ("sexual orientation" absent from list of protected characteristics); Human Rights Campaign, "Statewide Anti-Discrimination Laws & Policies, http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821 (last visited July 15, 2005); Lambda Legal Defense and Education

Marriage Act, Pub. L. 104-199, 100 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7 (1997) and at 28 U.S.C. § 1738C (1997), and the vast majority of states have either enacted similar legislation or amended their constitutions to preserve the traditional definition of marriage.[11]

Public law schools – in their capacity as law schools – have not only "chosen sides" in this ongoing battle, but are using their power to marginalize dissenters. Contrary to the public law school FAIR members' contention, the First Amendment *prohibits* rather than *protects* their misuse of power.

Fund, "Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation," http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=217 (last visited July 15, 2005).

[11] *See* http://www.domawatch.org/stateissues/index.html (last visited July 15, 2005); Human Rights Campaign, "Statewide Marriage Law," http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449 (last visited July 15, 2005); Lambda Legal, "State Laws Banning Marriage Between Same-Sex Couples," http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=1254 (last visited July 15, 2005).

CONCLUSION

For the reasons set forth herein, the Court's *amici* respectfully submit that the decision of the Third Circuit Court of Appeals should be reversed, and the case remanded for consideration of the application of the First Amendment, if any, to public as well as private institutions of higher education subject to the Solomon Amendment.

Respectfully submitted,

Gregory S. Baylor
(Counsel of Record)
CENTER FOR LAW
& RELIGIOUS FREEDOM OF THE
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Ln., Ste. 222
Annandale, Virginia 22003
Tel.: (703) 642-1070

Counsel for Amici Curiae

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In The

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL REFORM, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Third Circuit

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Petitioners

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Does the Constitution require the Federal Government to subsidize a law school when it intentionally impedes military recruitment because the military is complying with a duly enacted federal statute, 10 U.S.C. § 654 [3] that the petitioners concede (at least for purposes of this litigation) is constitutional, when another statute [10 U.S.C. § 983(b)(1)], specifically compels withholding federal funds?

2. Does the Unconstitutional Conditions Doctrine bar a condition on federal spending that ensures that the federal spending program at issue—financial support for *local* institutions of higher education—is a necessary and proper means of furthering an enumerated power delegated to Congress?

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No. 04-1152

In The

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

FORUM FOR ACADEMIC AND INSTITUT'L REFORM, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Petitioners

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that the Spending Clause limits federal spending to matters of national or general concern as opposed to purely local concern. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, including John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001); HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (1965); HARRY V. JAFFA, CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY (1999); WILLIAM J. BENNETT, OUR SACRED HONOR (1997); and Larry P. Arnn and Douglas A. Jeffrey, "*We Pledge Allegiance*"—*American Christians and Patriotic Citizenship*; in DANIEL C. PALM, ED., ON FAITH AND FREE GOVERNMENT (1997).

The Claremont Institute Center for Constitutional Jurisprudence, which is the public interest law unit of the Institute, has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *Cutter* v. *Wilkenson*, No. 03-9877, 125 S.Ct. 2113 (2005); *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Schaffer* v. *O'Neill*, 534 U.S. 992 (2001); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

Before addressing the validity of the Solomon Amendment itself, it is important to assess the source of federal authority for the underlying federal spending program to which the conditions of the Solomon Amendment is attached. The several pubic and private universities who have challenged the Solomon Amendment in this litigation all receive federal

funds in support of their educational efforts—funds conditioned on compliance with the Solomon Amendment The Constitution contains no enumerated power delegating to the federal government specific authority over education, of course, and federal funding for education does not fall within Congress's broad power under Article I, Section 8, clause 1, to tax and spend for the general welfare, properly understood, as the grants to particular local or state institutions are primarily for local, rather than national, benefit. Neither is the underlying federal spending program at issue here a valid exercise of Congress's near-plenary power over federal territory, *see* U.S. Const. Art. I, § 8, cl. 17 , as none of the institutions involved in this litigation are in the District of Columbia or other federal territories.

Rather, the most solid footing for federal financial grants to local institutions of higher education appears to be the power delegated to Congress in Article I, section 8 of the Constitution "to raise and support Armies," U.S. Const. Art. I, § 8, cl. 12, combined with the Article I, section 8 power afforded to Congress to adopt means that are both "necessary and proper" to effect the enumerated ends. U.S. Const. Art. I, § 8, cl. 18. While the breadth of federal spending on education may well press the limits of even these powers, at least some measure of federal spending for local institutions of higher learning is constitutional permissible when directly tied to Congress's efforts to raise and support Armies. The Solomon Amendment provides that necessary nexus; it would be odd, therefore, for the very condition which renders federal spending permissible to itself be unconstitutional. Further, it is well and correctly established that conditions on federal spending designed to insure compliance with the permissible ends of the federal spending program do not intrude upon constitutionally-protected speech and association rights.

ARGUMENT

I. As Originally Conceived, Congress's Power to Spend for the General Welfare Was Limited to Spending for National, as Opposed to Merely Local or Regional, Concerns.

Article I, Section 8, Clause 1 of the Constitution provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, cl. 1. On its face, the clause allows Congress to levy taxes only for two purposes: 1) to pay the debts of the United States; and 2) to provide for the common defense and general welfare of the United States. Yet to the modern eye, those two purposes are so broad as to amount to no limitation at all. Indeed, the contemporary view is that the power to provide for the "general welfare" grants Congress the ability to spend for anything it views as beneficial in some way, even if beneficial only to a small segment of the population or to a single locale. *See, e.g.*, Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 93 (2001) ("It is hard to imagine a broader statement of the scope of Congress's powers" than the "common defence" and "general welfare" language of the Spending Clause).

Such was not the view of those who drafted and ratified the Constitution, nor the view which prevailed in the political branches of government for the first half century of our nation's history, nor the view which prevailed in this Court until after its New Deal-era decision in *United States* v. *Butler*, 297 U.S. 1 (1936). James Madison and Thomas Jefferson held the limited view that the power to spend for the "general welfare" only authorized Congress to spend to further the other powers enumerated in Article I, Section 8. *See, e.g.*, Federalist 41, pp. 263-64 (Madison) (Rossiter, ed., 1961);

James Madison, Debate on the Cod Fishery Bill, 3 *Annals of Congress*, House of Representatives, 2nd Congress, 1st Session 386-87 (1792); Thomas Jefferson, Opinion on the Constitutionality of the National Bank, (Feb. 15, 1791), *reprinted in* THOMAS JEFFERSON, WRITINGS 416, 418 (Merrill D. Peterson, ed., Library of America 1984). Alexander Hamilton viewed the clause more expansively, but still believed it only authorized spending for the national welfare rather than local welfare. Alexander Hamilton, Report on Manufactures, Dec. 5, 1791, *reprinted in* 2 FOUNDERS CONSTITUTION 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987). Justice Story agreed with Madison and Hamilton on this limitation on the Spending Clause, saying that "[a] power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power...[I]f the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the constitution." Joseph Story, COMMENTARIES ON THE CONSTITUTION § 919, p. 382-83 (1833).

From 1800 to 1860, almost every President adhered to the view that the Spending Clause was limited, either by its own text or by the enumeration of powers which followed. In the closing days of his second term as President, for example, Madison vetoed an internal improvements bill that would have funded the construction of roads and canals "in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defence." President James Madison, Veto Message, 32 ANNALS OF CONG. 211 (1817). Madison rejected the contention that the Spending Clause authorized such expenditures, stating that such a broad reading would render "the special and careful enumeration of powers, which follow the clause, nugatory and improper." *Id.*, at 212. President James Monroe vetoed as unconstitutional a bill to preserve and repair the Cumberland road, noting in his veto message that Congress's

power to spend was restricted "to purposes of common defence, and of general, national, not local, or state, benefit." President James Monroe, Veto Message, 46 ANNALS OF CONG. 1838, 1849 (May 1822). President Andrew Jackson vetoed as unconstitutional an effort by Congress to improve navigation of the Wabash River. He conceded that the improvements in the navigable portions of the river qualified as in the "general" or national welfare, but he deemed improvements above the point of navigability to be an unconstitutional appropriation for local improvements rather than improvements in the general welfare. President Andrew Jackson, Veto Message, 28 H. R. Journal 28 (1834).

Presidents Tyler, Polk and Buchanan likewise vetoed internal improvements bills as an unconstitutional exercise of Congress's power under the Spending Clause. *See, e.g.*, President John Tyler, Veto Message, 39 H.R. Journal 1081 (June 11, 1844). President Buchanan took it as a given that the funds raised by Congress from taxation were "confined to the execution of the enumerated powers delegated to Congress." The idea that the resources of the federal government—either taxes or the public lands—could be diverted to carry into effect any measure of state domestic policy that Congress saw fit to support "would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution." "The natural intendment" of those who drafted and ratified the Constitution, he continued,

> would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation with respect to the public lands.

President James Buchanan, Veto Message, 55 H.R. Journal 506 (Feb. 26, 1859).

In addition to the views taken by the Founders and the early Presidents, strong evidence for interpreting the Spending Clause as being limited to the general rather than local welfare comes from the structure of the enumerated powers outlined in the Constitution. The enumerated powers given to Congress in the rest of Article I, Section 8 were themselves limited to matters that required national rather than local legislation. For example, early in the constitutional convention, Roger Sherman proposed that Congress should have power to legislate "in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned." Roger Sherman, Speech of July 17, 1787, *reprinted in* 2 MAX FARRAND, ED., THE RECORDS OF THE FEDERAL CONVENTION 21 (1911) (emphasis added); *see also id.* (proposal of Gunning Bedford) (giving to Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent"). His proposal, and others like it, were referred to the Committee of Detail, which on August 6, 1787 gave substance to his proposal by reporting back a list of enumerated powers that was eventually to become Article I, Section 8—powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states. Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the "general welfare" limitation in the spending clause.

This Court has also at times recognized that the Spending Clause is limited to the general rather than local welfare. In *Butler*, this Court held that "[w]hile . . . the power to tax is

not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Congress." *Butler*, 297 U.S., at 65-66. Though the Court rejected the long-standing Madisonian position that the power to spend for the "general welfare" only authorized Congress to spend to further the other enumerated powers, the Court nevertheless concluded that the "general welfare" clause imposed another limitation on Congress' spending power, namely, that the purpose of the spending "must be 'general, and not local.'" *Id.*, at 66-67; *see also id.*, at 87 (Stone, J., dissenting) ("The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national"). The Court then invalidated the Agricultural Adjustment Act as exceeding that textual limit. *Id.*, at 68.

In recent years, members of the Court have recognized the limits on the Spending Clause, as originally conceived. In her dissent in *South Dakota* v. *Dole*, for example, Justice O'Connor warned that "[i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" 483 U.S. 203, 217 (1936) (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S., at 78). Justice O'Connor emphasized that this "was not the Framers' plan and it is not the meaning of the Spending Clause." *Id.*

In two recent concurrences, Justice Thomas has also acknowledged the possibility that various pieces of federal legislation may exceed the Spending Clause. *See Sabri* v. *United States*, 124 S.Ct. 1941, 1949-50 (2004) (Thomas, J., concurring); *Cutter* v. *Wilkinson*, 125 S.Ct. 2113, 2125 n. 2, 2127 (Thomas, J., concurring). Justices O'Connor and Thomas are correct: As originally understood, the Spending

Clause is limited to spending that benefits national rather than local interests. *See also, e.g.*, Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 49 (2003) ("[T]he goal of the General Welfare Clause was to limit all congressional taxation and spending to general interest, as opposed to local or special interest, purposes."); Laurence Clause, *"Uniform Throughout the United States": Limits on Taxing as Limits on Spending*, 18 CONST. COMMENT. 517, 540 (2001) ("The 'general Welfare,' for promotion of which the Constitution was created, is the welfare of the whole United States. It is not an abstraction that authorizes any spending which benefits anyone within the United States."); Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article 1, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 127 (1999) ("Congress can tax for national, but not for local, purposes."); *see generally* John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 Chap. L. Rev. 63 (2001).

II. Federal Funding of Local Institutions of Higher Education Exceeds Congress' Power Under the General Welfare Provision of the Spending Clause Because It Supports Local, Not National, Interests.

Federal funding of higher education at local institutions, standing alone, is clearly unconstitutional under the original understanding of the Spending Clause. Such institutions of higher education primarily benefit local, not national, interests.

To draw the line between spending programs that are for the general welfare and those that are for the local welfare, one can look to the views of the founders and our earliest Presidents regarding which programs they believed would

violate the Spending Clause. Most of the rejected programs dealt with internal improvements to the states, whether they were to roads, rivers, harbors or canals. *See, e.g.*, President Thomas Jefferson, 5 H. R. Journal 469 (1806) (Jefferson on roads, rivers and canals); Act of July 22, 1790, 1 Stat. 53, 54 (Congress on rivers); President Andrew Jackson, 28 H. R. Journal 29, 30 (1834) (Jackson on roads); President James Polk, 43 H. R. Journal 83 (1847) (Polk on harbors and rivers). However, harbor improvements on the seaward side of ports of entry were found to be acceptable as they benefited the entire coastal trade. *See, e.g.*, President Andrew Jackson, Message Vetoing "An act to improve the navigation of the Wabash river," 50 H. R. Journal 27, 30 (1834). Loans and stock purchases for private companies were rejected, while refunds of commercial duties were allowed. *See, e.g.*, 2 *Annals of Congress*, House of Representatives, 1st Congress, 2nd Session 1686 (1790) (Congress on loans); President Andrew Jackson, 28 H. R. Journal 29, 30 (1834) (Jackson on stock purchases); 3 *Annals of Congress*, House of Representatives, 2nd Congress, 2nd Session 363, 397-98 (1792) (Congress on refunds of duties). Grants of land for insane asylums and agricultural colleges were also rejected as being unconstitutional. *See, e.g.*, 45 S. Journal 361 (1854) (President Franklin Pierce on insane asylums); President James Buchanan to House of Representatives (Feb. 24, 1859), in 5 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 3074, 3078 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS] (Buchanan on agricultural colleges). The line must be between spending that primarily benefits the nation as a whole, versus spending that primarily benefits local interests (and perhaps collaterally benefits national interests as well). Dredging a river in Georgia above the point of navigability primarily benefits the people of the State of Georgia, while erecting lighthouses on coastal waterways broadly benefits the entire national intercoastal trade. Act of July 22, 1790, 1 Stat. 53, 54.

In this case, the Court must determine whether federal spending on institutes of higher education primarily benefits national or local interests. A look to history shows that the original understanding of the Spending Clause did not view such spending as being for the general welfare. In 1806, President Jefferson proposed an amendment to the Constitution that would allow Congress to spend its surplus for "the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of the federal powers." THOMAS JEFFERSON, WRITINGS 416, 529 (Merrill D. Peterson, ed., Library of America 1984) [hereinafter WRITINGS]; 5 H. R. Journal 469 (1806); see also 4 S. Journal 109 (1806). He felt that such an amendment was necessary "because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public monies to be applied." Jefferson to William Branch Giles (December 26, 1825), in WRITINGS at 1509-12. In 1859, President Buchanan vetoed as unconstitutional an act donating public lands to the several states for the establishment of agricultural colleges. President James Buchanan to House of Representatives (Feb. 24, 1859), in 5 MESSAGES AND PAPERS at 3078.

In addition to this historical evidence that spending on local institutions of higher education violates the Spending Clause by primarily benefiting local interests, contemporary cases continue to emphasize the local nature of education. In *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), this Court recognized that "education is perhaps the most important function of state and local governments." This view has been reinforced in the decades since that case was decided. *See, e.g.*, *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."); *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control

over the operation of schools."); *United States* v. *Lopez*, 514 U.S. 549, 564 (1995) ("[E]ducation [is an area] where States historically have been sovereign."). Typically, educational institutions take local residents and train them to return and enter the local workforce. Even if Congress were to fund institutions in every state, this aggregation of several local benefits would still not be funding for the general, national welfare.

III. Federal Funding of Higher Education, When Viewed In Conjunction With The Restrictions Imposed By The Solomon Amendment, Does Not Exceed Congress' Power To Raise and Support Armies.

An examination of the original understanding of the Spending Clause shows that the clause does not authorize Congress to provide federal funding to local institutions of higher education. However, such funding may still be authorized under some other power granted to Congress in the Constitution. When funding of higher education is restricted by the Solomon Amendment to institutions allowing military recruiters on campus, this overall program—or at least parts of it—is permissible under Congress' power to raise and support armies. U.S. Const. Art. I, § 8, cl. 12.

"The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (citing *Lichter* v. *United States*, 334 U.S. 742, 755-758 (1948); *Selective Draft Law Cases*, 245 U.S. 366 (1918)). And as the Court of Appeals presumed, "the United States has a vital interest in having a system for acquiring talented military lawyers." *Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219, 245 (3d Cir. 2004) ("F.A.I.R."). The national interest in educating prospective soldiers has long been a motivating factor in federal funding of education. Historically, the first federal funding of private institutions of higher education came through government sponsorship of military officer training programs at private schools during World War I and World War II. It was only after this inroad that peacetime funding of private institutions began. *See* H. Kathryn Merrill, *The Encroachment of the Federal Government into Private Institutions of Higher Education*, 1994 B.Y.U. EDUC. & L.J. 63, 64-65 (1994).

For this purpose of educating future soldiers to be carried out successfully, the government must have the ability to recruit the students whose education is being subsidized. In this context, the Solomon Amendment is not a separate restriction or penalty imposed on a broader funding program, but instead is a tool to condition spending for the purposes for which it was authorized. The Amendment makes sure that these federal programs funding higher education really do go to help raise and support armies. This is why Judge Aldisert was right in his dissent to say that the Solomon Amendment was "not only authorized..., but commanded by" Congress' power to raise and support armies. *F.A.I.R.*, 390 F.3d, at 250 (Aldisert, J., dissenting).

IV. The Solomon Amendment's Restrictions on Educational Spending Do Not Violate the First Amendment.

Once the Solomon Amendment is seen as a necessary component of ensuring that federal funding of higher education goes to support the military, it becomes clear that it is part of a larger spending program rather than a separate imposition of a penalty. As part of a selective spending program, the unconstitutional conditions doctrine does not apply, because through the Solomon Amendment, Congress "is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they

were authorized." *Rust* v. *Sullivan*, 500 U.S. 173, 196 (1991).

The unconstitutional conditions doctrine provides that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). However, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. In *Rust*, Congress appropriated funding for family planning services and prohibited any of the funding from being used in programs providing abortion counseling. In *United States* v. *American Library Association*, 539 U.S. 194, 211 (2003), Congress providing funding to libraries but only to those that agreed to block obscene Internet sites. In such cases, the unconstitutional conditions doctrine does not apply because "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196. The key, then, is determining whether the Solomon Amendment is a component of the funding programs that was put in place to ensure that the money was spent for the authorized purposes, or whether it is a separate denial of a benefit or imposition of a penalty that takes away funds from some recipients for reasons unconnected with the Government's purposes for providing the funding.

Federal funding of local institutions of higher education is arguably a necessary and proper means of giving effect to Congress' power to raise and support armies. The Solomon Amendment, by permitting funding only to those institutions that allow military recruiters on campus, serves to ensure that the federal money is really going to help educate potential soldiers. As such, the Amendment is not imposing a penalty but is "instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500

U.S. at 196 (1991). Thus the Solomon Amendment does not violate the First Amendment.

CONCLUSION

The decision of the Third Circuit should be reversed.

Respectfully submitted,

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

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FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

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BRIEF AMICI CURIAE OF 56 COLUMBIA LAW SCHOOL FACULTY MEMBERS IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

[Individual Amici Listed On Inside Cover]

JONATHAN D. SCHILLER
Counsel of Record
DAVID A. BARRETT
GARY K. HARRIS
WILLIAM C. JACKSON
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., N.W.
Washington, D.C. 20015
(202) 237-2727

Counsel for Amici Curiae

SEPTEMBER 2005

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JOSÉ E. ALVAREZ
MARK BARENBERG
VIVIAN BERGER
GEORGE A. BERMANN
BARBARA ARONSTEIN BLACK
VINCENT A. BLASI
LEE C. BOLLINGER
MARVIN A. CHIRELSTEIN
KIMBERLE WILLIAMS CRENSHAW
LORI FISLER DAMROSCH
MICHAEL C. DORF
MICHAEL W. DOYLE
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HAROLD S. H. EDGAR
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BENJAMIN L. LIEBMAN
CAROL B. LIEBMAN
JAMES S. LIEBMAN
EDWARD LLOYD
GILLIAN METZGER
EBEN MOGLEN
SUBHA NARASIMHAN
GERALD L. NEUMAN
KATHARINA PISTOR
ANDRZEJ RAPACZYNSKI
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BARBARA A. SCHATZ
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MICHAEL I. SOVERN
JANE M. SPINAK
PETER L. STRAUSS
SUSAN P. STURM
KENDALL THOMAS
PATRICIA J. WILLIAMS
JOHN FABIAN WITT
MARY MARSH ZULACK

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BRIEF AMICI CURIAE OF 56 COLUMBIA LAW SCHOOL FACULTY MEMBERS IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICI CURIAE

Amici curiae are individual members of the faculty of the Law School at Columbia University.[1] As faculty members, Amici have undertaken to provide students of Columbia Law School ("Columbia Law School," "Law School" or "School") with an education in the study and practice of law at the highest level of intellectual challenge and accomplishment. As part of that mission, the Law School faculty has adopted policies that span a wide variety of topics, from curriculum choices, to graduation qualifications, to recruitment policies, to more mundane issues.

The Law School has long sought to facilitate structured contact between its students and prospective employers, both on and off campus. This structured contact is beneficial to both groups. Law School students are provided with the opportunity to learn about and consider employment in diverse areas of practice. Similarly, employers are given the opportunity to agree to participate in

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, Amici state that no counsel for a party has written this brief in whole or in part and that no other person or entity, other than Amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Lee C. Bollinger, President of Columbia University, appears in this proceeding in his capacity as a Professor of Law. Michael A. Heller, a member of the Law School administration, appears in this proceeding in his capacity as a Professor of Law.

the employment recruiting programs sponsored by the School so that, in a fair and efficient manner, they can meet and evaluate the School's students.

In this regard, Columbia Law School has adopted various policies and procedures with which both its students and all employers seeking the assistance of the School's Office of Career Services ("OCS") must comply. Consistent with the School's educational mission, these policies are designed to give fair and equal treatment to each student and prospective employer, to minimize academic disruption, and to protect student privacy. For example, all students and employers participating in the Law School's Early Interview Program do so on one or more of five days in mid-August set annually by the Law School. Interviews are scheduled pursuant to a bid/lottery system, in which a computer program schedules interviews according to student interest until an employer's schedule is filled. *See* www.law.columbia.edu/careers/career_services/employers/Hiring_Informat/Interview_Progr. In order to ensure the integrity of its bid/lottery system, the Law School requires that all participating employers agree not to pre-screen interested students and not to engage in unsolicited direct contact with students. *Id.* The Law School's universally applicable policies further require that participating employers hold open any offers extended to the School's students until dates specified by OCS. *Id.*

As part of its universally applicable recruitment policies, Columbia Law School also requires that any employer participating in School-sponsored recruiting programs or receiving recruiting assistance from OCS provide an assurance that the employer does not discriminate on certain bases, including race, color, religion,

national origin, sex, age, handicap or disability, and sexual orientation. *Id.* This long-standing nondiscrimination policy is Columbia Law School's corollary to the nondiscrimination policy adopted by the American Association of Law Schools in 1990. *See Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 224-25 (3d Cir. 2004); J.A. 251.

Columbia Law School's nondiscrimination policy, by its words and by the School's practices, applies equally to each and every employer seeking recruitment assistance at the School. No non-military employer is excepted from this policy. Hundreds of employers, spanning the spectrum of private, public and public interest entities, including leading law firms, U.S. Attorneys' Offices, Public Defender Offices, the Federal Bureau of Investigation, the Central Intelligence Agency, the Office of the Comptroller of the Currency, the State Department Office of Legal Advisor, and the House of Representatives Office of the Legislative Counsel have all availed themselves of the School's OCS services by complying with the Law School's evenhanded policies.[2]

None of the School's policies, including its nondiscrimination policy, singles out military recruiters, and there has been no effort in practice to apply the nondiscrimination policy to the military in any manner other

[2] As at other law schools, *see* J.A. 33, 75-76, non-participating employers and Columbia Law School students remain free to contact each other in any manner they choose, using means of recruitment outside OCS-sponsored recruiting activities and processes. Military recruiters, for example, have been provided special interview facilities on Columbia University's campus, with notices of such interviews circulated and posted by the Law School.

than how it has been applied to every other employer. Despite this equal treatment of all employers, the United States Air Force notified Columbia Law School on May 29, 2002 that it was not in compliance with the Solomon Amendment. Other law schools received substantially identical notifications from the military. *See, e.g.*, J.A. 111-12 (Letter from Clyde J. Tate II, Chief, Personnel, Plans, and Training Office, United States Army, to Richard C. Levin, President, Yale University, dated May 29, 2002); J.A. 128-33 (Letter from William J. Carr, Acting Deputy Under Secretary of Defense, to Mr. Levin, dated May 29, 2003). The military demanded that the Law School waive as to military recruiters the School's otherwise universally applicable nondiscrimination policies. Rather than jeopardize federally funded programs at Columbia University, including various science and technology programs, the Law School agreed to waive its nondiscrimination policy as to military recruiters.

Amici seek to file this brief because they believe that evenhanded application of universally applicable recruitment policies such as those adopted at Columbia Law School satisfies the Solomon Amendment's requirement as currently written that institutions receiving federal funds permit the military to "gain[] access" to campuses and to students on campuses "for purposes of military recruiting *in a manner that is at least equal in quality and scope* to the access . . . that is provided to any other employer." 10 U.S.C. § 983(b)(1) (2005) (emphasis added). Amici respectfully urge that this Court apply the Solomon Amendment as it is written and affirm the judgment below, without reaching the constitutional issues that have been argued by the parties.

SUMMARY OF ARGUMENT

"'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)). The Court here can avoid passing on the constitutional questions presented by the parties by applying the Solomon Amendment as it is written, and determining that the text of the Solomon Amendment does not bar federal funding for institutions of higher education that have adopted and evenhandedly applied to all employers policies prohibiting discrimination by organizations participating in institutionally-sponsored recruiting programs.

Pursuant to the provisions of the Solomon Amendment, no specified funds may be provided to an institution of higher education if that institution bars the military from "gaining access" for "recruiting in a manner that is at least equal in quality and scope" to the access provided to "any other employer." 10 U.S.C. § 983(b)(1) (2005). The only reasonable construction of the statute is one that permits federal funding to institutions of higher education whose universally applicable policies do not single out the military for gaining access to campuses and students on less favorable terms than the terms provided to other employers. Because nondiscrimination policies applicable and evenhandedly applied to all employers do not trigger the provisions of the Solomon Amendment, this Court should affirm the issuance of the preliminary injunction by the court below.

ARGUMENT

I. THE SOLOMON AMENDMENT DOES NOT PROHIBIT THE PROVISION OF FEDERAL FUNDING TO INSTITUTIONS OF HIGHER EDUCATION WHOSE RECRUITING POLICIES PROVIDE ACCESS TO MILITARY RECRUITERS ON THE SAME TERMS AS ALL OTHER EMPLOYERS

A. The Solomon Amendment Does Not Prohibit Federal Funding to Institutions Whose Policies and Practices Treat the Military Identically to All Other Employers

In determining the scope of a statute, the Court "begin[s] with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)); *accord, e.g., BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion). Where, as here, "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The current version of the Solomon Amendment provides in pertinent part:

> (b) .... No funds ... may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of

> when implemented) that either prohibits, or in effect prevents –
>
> > (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; . . . .

10 U.S.C. § 983(b)(1) (2005).

The text and structure of this statute are clear, and the statute's command is narrowly targeted. To be eligible for certain specified federal funding, an institution may not, through a policy or practice, treat military recruiters less favorably than the institution treats other employers. In the precise words of the statute, federal funding is conditioned upon military recruiters "gaining access . . . in a manner that is at least equal in quality and scope to the access . . . that is provided to any other employer." *Id.* The sole requirement is equality in the "manner" by which military and non-military recruiters may "gain[] access." Conversely, nothing in the statute requires that military recruiters be afforded especially favorable treatment or be exempted from evenhanded application of institutional policies.

The Solomon Amendment as it is currently written prohibits the provision of specified federal funds to an institution whose recruiting policies and practices single out the military for unfavorable treatment. For example, an institution would not remain eligible for the specified funding if it had a policy that singled out military recruiters and barred them from entering its campus, but did not

likewise bar all other employers. *See* 32 C.F.R. § 216.4(c)(3) (2005). Similarly, if an institution's practice were to require military recruiters to conduct interviews only during July, but the institution allowed other employers to conduct interviews at any time during the school year, such "practice" would "in effect prevent[]" the military from gaining access to campuses and students "in a manner" equal to other employers. The Solomon Amendment would therefore prohibit the provision of the specified funding.

This same reading of the text of the Solomon Amendment also makes clear what recruiting policies and practices do not trigger the statute's bar on funding. To remain eligible for funding, an institution need not grant military recruiters access on more favorable terms than other employers. As Petitioners flatly admitted in the court below, the "Solomon Amendment does not demand preferential access for military recruiting." Br. for Appellees at 34, *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433).[3]

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[3] The Solomon Amendment is not the only federal statute in which the phrase "at least equal" appears. In the Telecommunications Act of 1996, Congress used similar language to the Solomon Amendment, and required that local phone companies provide competitors certain services at a level "at least equal in quality" to the level at which the local phone companies provided those services to themselves. 47 U.S.C. § 251(c)(2)(C) (2005). The Eighth Circuit ruled that this language "mandate[d] only that the quality be *equal – not superior.*" *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997) (emphasis added), *rev'd on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The court there struck down as "violat[ing] the plain terms of the Act" an FCC rule requiring incumbent local phone companies to provide competing carriers with services "superior to those levels at which the incumbent [local phone companies] provide these services to

(Continued on following page)

The text of the Solomon Amendment thus permits an institution to apply to military recruiters policies that are applied without exception to all other employers and with which *all* employers must comply to gain access for recruiting purposes.[4] For example, the Solomon Amendment does not prohibit federal funding for an institution that charges the military the same reasonable administrative fee to participate in school-sponsored recruiting programs that it charges other employers. *Cf.* 32 C.F.R. § 216.4(e), (f)(2) (2005) (providing that the military will pay an institution's "actual costs" for "providing military recruiters access to student recruiting information" so long as those costs are "reasonable and customary"). Similarly, an institution that receives federal funding may, consistent with the Solomon Amendment, apply to military recruiters other placement office policies applicable to all other employers, such as rules against pre-screening interested students, rules against contacting students prior to school-sponsored interviews, and rules setting the time and place of interviews.

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themselves." *Id. See also Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000) ("The phrase 'at least equal in quality' establishes a minimum level[;] . . . it does not require anything more."), *rev'd on other grounds by Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002); *MCI Telecomms. Corp. v. N.Y. Tel. Co.*, 134 F. Supp. 2d 490, 506 (N.D.N.Y. 2001) ("While the phrase 'at least equal in quality' leaves open the possibility that [entities] may agree to provide [service] that [is] superior in quality to that provided to itself and others, it establishes a floor below which the quality of [service] may not go.").

[4] It is undisputed, *see Forum for Academic and Institutional Rights*, 390 F.3d at 224 n.2, that the nondiscrimination policies at issue here are applied evenhandedly to all employers, and that "the schools refuse to assist *any* employer that declines" to comply. *Forum for Academic and Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269, 281 (D.N.J. 2003) (emphasis added).

Put simply, nothing in the statutory language authorizes the Secretary of Defense to pick and choose which of the institution's policies military recruiters will comply with. Petitioners have consistently admitted as much in this action. *See, e.g.*, Pets. Br. at 35 (Institutions can restrict military recruiters and can "continue to receive federal funding as long as they treat other recruiters the same."); Br. for Appellees at 36, *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) (Solomon Amendment permits institutions to place "equivalent limits on military and non-military recruiters.").

The text and structure of the Solomon Amendment make clear how the statute's equality requirement is to be measured and confirm as proper the reading of the statute set forth above. As Judge Easterbrook has put it, "[e]quality is an open term. . . . Equal *with respect to what* is the essential question." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors' Ass'n*, 814 F.2d 358, 367 (7th Cir. 1987) (emphasis in original). The answer to this question – *equal with respect to what?* – cannot come from the equality requirement itself. It "must come from some independent source." *Id.* What satisfies the Solomon Amendment's demand for equality between military and non-military recruiters? The answer turns on the relevant criteria for determining that equality. If equality is measured in terms of treatment, then an evenhandedly applied policy applicable to all employers provides equality to all who are subject to it. By contrast, if equality is measured in terms of outcomes (or, as the Government has put it in a different case, "actual access," Defendant's Supplemental Memorandum Concerning Amendment to 10 U.S.C. § 983 ("Supplemental Memorandum") at 4, *Burt v. Rumsfeld*,

354 F. Supp. 2d 156 (D. Conn. 2005)), then a universally applicable recruiting policy (*e.g.*, requiring the payment of administrative fees or a certification of nondiscrimination) that has the effect of limiting the participation of recruiters who fail to comply provides unequal access. The Solomon Amendment, however, cannot reasonably be construed as making federal funding turn on equality of outcomes ("actual access") regardless of universally applicable policies.

In the text of the Solomon Amendment, Congress provided the criteria – the "independent source," as Judge Easterbrook would have it, *Premier Elec. Constr. Co.*, 814 F.2d at 367 – for the measurement of the requisite equality. All that is required is that military recruiters be permitted to gain access to campuses and students "in a manner" at least equal to non-military recruiters. The phrase "in a manner" indicates that the *process or way in which the military gains access* to campuses and students on campuses must be equal to all other employers. *See* Webster's Third New International Dictionary of the English Language Unabridged 1376 (1993) (defining manner as "the mode or method in which something is done or happens; a mode of procedure or way of acting"); The American Heritage College Dictionary 825 (3d ed. 1993) (defining manner as "[a] way of doing something or the way in which a thing is done or happens"); 9 Oxford English Dictionary 323-24 (2d ed. 1989) (defining manner as "[t]he way in which something is done or takes place; method of action; mode of procedure"). By providing that the relevant measure of equality is equality in the process or way in which the military gains access, the statute has created a sensible scheme of equal treatment under universally applicable recruitment procedures in which

military recruiters may not be singled out for unfavorable treatment.

Indeed, to construe the Solomon Amendment as requiring equality of outcomes or "actual access" is to read out of the statute the phrase "in a manner." Giving effect to that phrase as more than mere surplusage requires that the statute be construed as adopting equal treatment rather than equal outcome as its criteria of equality. *See Bennett v. Spear*, 520 U.S. 154, 173 (1997) (noting as "the cardinal principle of statutory construction . . . that it is our duty to give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

Moreover, construing the statute to require equal treatment rather than equal outcomes comports with the "'ordinary or natural meaning'" of the statutory words in question. *Leocal v. Ashcroft*, ___ U.S. ___, 125 S. Ct. 377, 382 (2004) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)); *see also Smith*, 508 U.S. at 241-42 (Scalia, J., dissenting); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 109-11 (2001). A moviegoer "gain[s] access" to a theater to watch a movie "in a manner that is at least equal" to all other moviegoers only if the moviegoer purchases a ticket, and abides by the theater's policy not to smoke inside the theater. The moviegoer's refusal or inability to pay for a ticket and abide by the theater's non-smoking policy does not mean that the theater has "prohibit[ed] or in effect prevent[ed]" the moviegoer from "gaining access" to watch the movie "in a manner that is at least equal" to that of any other moviegoer. Likewise, to "gain access" to an airline flight, all passengers must comply with the mandated security screenings. If a potential passenger declines to so comply,

that passenger will not be boarded. The refusal to board such a passenger, however, does not mean that the airline has "prohibit[ed] or in effect prevent[ed]" the passenger from "gaining access" to the flight "in a manner that is at least equal" to that of all other passengers. So, too, for educational institutions under the Solomon Amendment as Congress wrote that statute: requiring all employers to comply with the institution's recruiting policies, including nondiscrimination policies, provides all employers access on equal terms and conditions. To read the Solomon Amendment as exempting the military from such policies is to grant the military not equality but, rather, precisely the preferential access that Petitioners admit the statute does *not* require. *E.g.*, Br. for Appellees at 34, *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) ("Solomon Amendment does not demand preferential access for military recruiting.").

Only by adopting the equal treatment construction of the statute can this Court avoid the conclusion that the Solomon Amendment gives the military the authority to pick and choose which recruiting policies it will follow. In a similar case challenging the Solomon Amendment, the Government argued (and the district court found) that equivalence under the Solomon Amendment is measured by outcomes ("actual access"). Supplemental Memorandum at 4; *Burt*, 354 F. Supp. 2d at 173 (D. Conn. 2005).[6] The

[6] In the *Burt* proceeding, defendant has filed a notice of appeal in the Court of Appeals for the Second Circuit and the plaintiff has filed in this Court a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit before judgment. *See* Pet. for Cert., *Burt v. Rumsfeld*, No. 04-1434.

consequence of such a construction, however, is to undo all evenhanded recruitment policies to which a Secretary of a military department declines to agree, including interview schedules, limitations on student contact, registration fees, and the like. Indeed, the Government's position before the district court in *Burt* was that an institution fails to comply with the Solomon Amendment if it does not permit the military to participate in school-sponsored recruiting programs, "regardless of the asserted reason for the exclusion." Supplemental Memorandum at 5; *see also Burt*, 354 F. Supp. 2d at 173 (statute requires more than the military be given "the same opportunity" to participate in recruiting programs). Congress, however, "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (finding it "implausible" that Congress would have extended broad powers to an agency "through . . . modest words"); *see also FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 159 (2000) ("In extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."). Therefore, the "modest words" of the Solomon Amendment should not be construed to provide the military with the broad preferences and exemptions the Government claimed in *Burt*. Indeed, measuring equality under the statute according to outcomes rather than treatment would convert the Solomon Amendment into precisely the power for the military to pick and choose among recruitment policies that Petitioners properly and expressly reject in this action. *See, e.g.*, Pets. Br. at 18 (Solomon Amendment requires "the federal government should be given an *equal opportunity to recruit*.") (emphasis added).

It would be extraordinary if the Solomon Amendment – almost alone among federal equality norms – requires equal outcomes rather than equal treatment. *Cf. Washington v. Davis*, 426 U.S. 229, 245-48 (1976) (holding that neutral criteria in government employment did not violate the Equal Protection Clause despite disparate impact on members of certain race); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979) (holding that neutral criteria in state employment did not violate the Equal Protection Clause despite disparate impact on women). The statute's requirement that the military gain access "in a manner" that is equal, along with the consequences that would follow from construing the statute to require equal outcomes, indicates Congress has done no such thing in enacting the Solomon Amendment.

B. The History of the Solomon Amendment Supports the Interpretation that the Statute Was Not Intended to Apply to Even-handed Policies and Practices

As this Court has "repeatedly held, the authoritative statement" of the meaning of a statute "is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, ___ U.S. ___, 125 S. Ct. 2611, 2626 (2005). "With a plain, nonabsurd meaning" of the Solomon Amendment "in view," *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004), the Court need not consider the statute's legislative history. Rather, the Court "prefer[s] the plain meaning since that approach respects the words of Congress. In this manner [the Court] avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Id.* at 536.

With regard to the Solomon Amendment, "nothing in the legislative history indicates directly and explicitly that Congress understood," *Allapattah Servs.*, 125 S. Ct. at 2627, that the statute would apply to an institution's evenhandedly administered recruitment policies applicable to all employers. Rather, although perhaps somewhat "murky" and "ambiguous," *id.* at 2626, the history of the Solomon Amendment does demonstrate that the provision was directed solely at policies and practices that discriminate against military recruiters.

The original ancestor of the current Solomon Amendment was enacted in 1968, against the backdrop of universities registering their disapproval of the Vietnam War by refusing to allow military recruiters on campus. That legislation directed NASA, absent a waiver, to withhold financial grants to institutions that "barred military recruiters from their campuses." Pets. Br. at 3 (citing National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 281).

By 1994, Congress believed, *see* 140 Cong. Rec. H3861, H3863 (daily ed. May 23, 1994) (statements of Rep. Solomon and Rep. Pombo, respectively), that waivers had been granted so generously that the then-current legislation no longer served its purpose of withholding Pentagon funding from schools that "barred military recruiters from campus." *See* Pets. Br. at 3. Rather than fundamentally change the statutory framework, however, Congress decided "simply . . . [to enforce] existing law." 140 Cong. Rec. at H3862 (statement of Rep. Solomon). The Solomon Amendment, enacted in October 1994, substantially reproduced the 1968 legislation while curtailing the Secretary of Defense's power to grant waivers. National Defense Authorization Act for Fiscal Year 1995, Pub. L.

No. 103-337, Div. A, Title V, Subtit. E, § 558, 108 Stat. 2776 (1994); *see also* Pets. Br. at 3-4.

The Department of Defense subsequently promulgated regulations to implement the 1994 Solomon Amendment. The regulations for the 1994 statute indicated that universally applicable policies and practices that were evenhandedly applied did not provide a basis for the Government to withhold the specified funding. For example, that portion of the Solomon Amendment currently codified at 10 U.S.C. § 983(b)(2) provides that the Secretary may withhold funds from an institution that "prohibits or in effect prevents access by military recruiters" to certain "information pertaining to students." In its regulations, however, the Department has recognized that when a student "opt[s]-out" of the release of "directory information" an institution of higher education "will not be considered . . . to have denied access" under the Solomon Amendment if the "student 'opt-outs' from the disclosure of directory information . . . are *evenhandedly applied to all prospective employers* seeking information for recruiting purposes." *Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education*, 63 Fed. Reg. 56,819, 56,820 (Oct. 23, 1998) (codified at 32 C.F.R. pt. 216) (emphasis added); *see* 32 C.F.R. § 216.4(c)(5) (exempting institutions that certify that "each student concerned has formally requested the covered school to withhold this information from third parties").

Indeed, in a "sample letter" that was included in the regulations, the Department of Defense expressly confirmed that the 1994 Solomon Amendment applied solely to an institution's disparate treatment of the military. That sample letter, which is used to verify an institution's policy regarding recruiting by the military, *Military*

Recruiting, 63 Fed. Reg. at 56,823 (final rule codified at 32 C.F.R. § 216.5(b)(2)), requests institutions of higher education to "highlight *any difference* between access for military recruiters and access for recruiting by other potential employers." *Id.* at 56,824, Appendix A to 32 C.F.R. pt. 216 (emphasis added).

In October 2004, Congress amended the Solomon Amendment to add the requirement that specified federal funds be conditioned on allowing military recruiters to gain access to campuses or access to students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." The limited legislative history of the 2004 amendment that bears on the question suggests that Congress sought merely to ensure that the military not be discriminated against vis-à-vis other employers. The Senate Armed Services Committee stated that the 2004 amendment was addressed to "incidents of *unequal treatment* of military recruiters at certain colleges and universities." S. Rep. No. 108-260, at 330 (May 11, 2004) (referring S. 2400 to full Senate) (emphasis added).

Similarly, in the House, Representative Cox, a cosponsor of H.R. 3966,[6] emphasized that the scope of the 2004 amendment was limited to discrimination against the military: "The premise of the bill is a simple one:

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[6] Although there was no debate regarding the 2004 amendment during the passage of the House, Senate, and Conference Committee versions of the 2005 Defense appropriations bill, there was extensive debate in the House on H.R. 3966 which had text identical to the final provision. H.R. 3966 passed the House by a vote of 338-86 on March 30, 2004, 150 Cong. Rec. at H1711-12, but died in committee in the Senate after an identical provision was inserted in the FY 2005 Defense appropriations bill.

Colleges that *discriminate against* the United States Armed Services should not receive U.S. taxpayer funds related to national defense and homeland security.' 150 Cong. Rec. H1707 (daily ed. Mar. 30, 2004); *see also id.* at H1711 (statement of Rep. Rogers, main sponsor of H.R. 3966) (noting that the bill "would ensure nothing more than fair and *equal treatment* of recruiters"); *id.* at H1708 (statement of Rep. Cox) (Harvard University "faculty voted to *ban the military* from campus in protest to the Vietnam War and that ban has been in place ever since.") (all emphases added).[7]

Accordingly, to the extent that the Court finds the legislative history or other extrinsic materials relevant – and Amici believe they are not in light of the text of the statute – those materials confirm that only those policies that are not "evenhandedly applied to all prospective employers," *Military Recruiting*, 63 Fed. Reg. at 56,820, violate the requirement of the Solomon Amendment. The legislative history described here confirms that the Solomon Amendment's language requires only equality in treatment, not equality in outcomes. *See* Section I.A.

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[7] To be sure, in "'their zeal to defeat'" the 2004 amendment, its opponents "'understandably . . . overstate[d] its reach,'" *Bryan v. United States*, 524 U.S. 184, 196 (1998) (quoting *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964)), in suggesting that the amendment would require an institution to waive, as to military recruiters, that institution's evenhanded policies. *See, e.g.*, 150 Cong. Rec. H1710 (daily ed. Mar. 30, 2004) (statement of Rep. Farr). As this Court, however, has long recognized, "'[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" *Bryan*, 524 U.S. at 196 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)); *accord, e.g., Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981).

supra. Thus, the legislative history supports the reading of the statute that permits the application of universally applicable nondiscrimination policies to military recruiters.

II. THE INTERPRETATION OF THE STATUTE OFFERED BY THE DEPARTMENTS OF THE MILITARY IS NOT ENTITLED TO DEFERENCE

The Solomon Amendment provides that specified funds may not be provided to an institution of higher education "if the Secretary of Defense determines" that the institution has a policy or practice which fails to satisfy the Amendment's equality requirement. Nonetheless, the Department of Defense letters to various law schools, *see, e.g.*, J.A. at 128-33, which purport to interpret what that equality requirement is, are not entitled to any deference under either *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

First, the Solomon Amendment "speaks clearly to the issue at hand." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (citing *Chevron*, 467 U.S. at 843); *accord Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). Because construing the equality mandate of the Solomon Amendment to require equal outcomes or actual access – rather than equal treatment – would authorize the Secretary of Defense to stop federal funding to institutions of higher education whenever a Secretary of a military department declined to comply with such an institution's recruitment policy, *see* Section I.A. *supra*, the only reasonable construction of the Solomon Amendment is one that permits the application of universally applicable nondiscrimination

policies to military recruiters. Even if the military had adopted a formal interpretation of the Solomon Amendment's equality requirement, the unambiguous text of the statute would have mandated an interpretation requiring only equal treatment, not equal outcomes. *Cf. Gen. Dynamics Land Sys., Inc.*, 540 U.S. at 600.

Second, the Government in *Burt* expressly admitted that the letters to the various law schools did not constitute final determinations by the military as to the scope of the Solomon Amendment. *See, e.g.*, Def.'s Mot. to Dismiss Pls.' Compl. at 2, *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005).

Third, any purported interpretation of the statute set forth in the letters was "'not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking.'" *United States v. Mead Corp.*, 533 U.S. 218, 254 (2001) (Scalia, J., dissenting) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). Thus, the Department of Defense letters, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587.

Finally, the military Departments' letters also lack the indicia this Court has identified as bearing upon such a pronouncement's "power to persuade." *Mead Corp.*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140). The Government, for example, has adopted inconsistent positions on the critical issue of the proper construction of the Solomon Amendment. Although the military took a contrary stance in *Burt*, Supplemental Memorandum at 5, Petitioners have consistently adopted the view in this

action that the Solomon Amendment does *not* authorize the military to pick and choose the recruiting policies with which the military will comply. *See, e.g.*, Pets. Br. at 35 (Institutions can restrict military recruiters and can "continue to receive federal funding as long as they treat other recruiters the same."); Br. for Appellees at 36, *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) (Solomon Amendment permits institutions to place "equivalent limits on military and non-military recruiters.").

The interpretations of the Solomon Amendment offered in the Department of Defense letters are also inconsistent with the Department's prior interpretation that evenhanded policies applicable to all employers are outside the scope of the Solomon Amendment. *Compare* J.A. at 128-33 (construing generally applicable policies as inconsistent with the Solomon Amendment's equality requirement), *with Forum for Academic and Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269, 282 (D.N.J. 2003) (citing 1998 letter from Department of the Army recognizing that, although USC did not exempt the Army from its nondiscrimination policy, "USC Law's career services office 'provid[ed] . . . military recruiters a degree of access to students that is equal in quality and scope to that afforded other employees' "). The military's recent letters are devoid of any evidence that the Solomon Amendment's relationship to generally applicable recruitment policies was thoroughly considered. Indeed, the letters do not attempt to justify the validity of the Department's reasoning, but rather rely solely upon an *ipse dixit* conclusion about the meaning of the Solomon Amendment's equality requirement.

III. THE CANON OF CONSTITUTIONAL AVOIDANCE COUNSELS IN FAVOR OF CONSTRUING THE STATUTE SO AS NOT TO PASS ON A QUESTION OF CONSTITUTIONALITY

It is apparent from the decisions below, the *Burt* decision, and the briefs of the parties and the various amici that reading the Solomon Amendment to deny funding to institutions of higher education that evenhandedly apply universally applicable nondiscrimination policies to military recruiters raises "serious constitutional doubts." *Clark v. Martinez*, ___ U.S. ___, 125 S. Ct. 716, 724 (2005). Those doubts are only exacerbated in light of the observation this Court made in *Rust v. Sullivan*, 500 U.S. 173, 200 (1991), that the "Government's ability to control speech" by conditional grants of federal funding is more limited in "a traditional sphere of free expression" such as a university than elsewhere.

It is a "cardinal principle" of statutory construction that when there is "a serious doubt" as to the constitutionality of an Act of Congress, the Court "will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Jean v. Nelson*, 472 U.S. at 854 (quoting *Spector Motor Serv.*, 323 U.S. at 105); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the

latter."). Indeed, "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" *Rust*, 500 U.S. at 191 (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). As the Court most recently explained, the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Martinez*, 125 S. Ct. at 724.[8]

Even without the canon of constitutional avoidance, the Solomon Amendment is clear and unambiguous. For the reasons set forth in Part I, the Solomon Amendment requires equality in the sense of equal treatment, not in the sense of equal outcomes or actual access. Yet, even if the question remained open as to what kind of equality the Solomon Amendment requires, the canon of constitutional avoidance counsels in favor of adopting the construction of the statute that avoids the "serious constitutional doubts," *Martinez*, 125 S. Ct. at 724, that would arise if the statute is construed to condition specified federal funding on an institution's agreement to grant special waivers to military recruiters.

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[8] The canon of constitutional avoidance supplies a further reason not to defer to the interpretation of the Solomon Amendment's equality requirement offered in the military's letters to various law schools. *See* Part II *supra*. As the Court held in *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), "where an otherwise acceptable [agency] construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

CONCLUSION

Congress could have enacted a statute purporting to prohibit the provision of specified federal funding to institutions of higher education absent special waivers of those institutions' nondiscrimination policies for military recruiters. Yet the constitutional questions that such a statute would raise are not before the Court for a simple reason – to date Congress has not enacted such a statute. Because in both word and practice the law school policies presently before the Court permit military recruiters to "gain[] access" in "a manner that is at least equal in quality and scope" to that provided all other employers, the Government has no basis under the Solomon Amendment to withhold funding from institutions of higher education that have adopted such policies. There is thus no need to decide whether the Constitution supports the issuance of the preliminary injunction entered by the court below. The preliminary injunction prohibiting Petitioners from withholding federal funding, or threatening to do so, because of an institution's universally applicable nondiscrimination recruitment policies should be affirmed because such policies do not violate the Solomon Amendment.

Respectfully submitted,

JONATHAN D. SCHILLER
Counsel of Record
DAVID A. BARRETT
GARY K. HARRIS
WILLIAM C. JACKSON
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., N.W.
Washington, D.C. 20015

Counsel for Amici Curiae

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SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
DAVID A. O'NEIL
CAREY BOLLINGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for amici Columbia University, Harvard University, The University of Chicago, and Yale University

(ADDITIONAL COUNSEL LISTED ON INSIDE COVER)

JAMES J. MINGLE
CORNELL UNIVERSITY
300 CCC Bldg., Garden Avenue
Ithaca, NY 14853
(607) 255-3903

Counsel for amicus
Cornell University

ADA MELOY
NEW YORK UNIVERSITY
70 Washington Square South
New York, NY 10012
(212) 998-2258

Counsel for amicus
New York University

WENDY S. WHITE
UNIVERSITY OF PENNSYLVANIA
133 South 36th Street
Philadelphia, PA 19104
(215) 746-5240

Counsel for amicus
University of Pennsylvania

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STATEMENT OF INTEREST OF AMICI[1]

Columbia University, Cornell University, Harvard University, New York University, the University of Chicago, the University of Pennsylvania, and Yale University are all private universities that are committed to the interrelated

[1] No counsel for a party authored any part of this brief. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. We note that New York University School of Law is a member of respondent FAIR. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

goals of providing the best possible education for their students and leading the world in groundbreaking scientific and medical research.[2] Each receives many millions of dollars of federal funding every year, a large portion of which is used to sponsor and conduct basic research.

Amici recognize that federal grants and contracts necessarily come with a series of conditions that relate to the use of the federal funds. It is essential, however, to the continued vitality of private research universities—to their success both in educating their students and in serving as centers of innovation and discovery—that this Court recognize reasonable limits on the ability of the federal government to use the coercive power of massive research funding to intrude on academic freedom.

In this case, the United States takes an exceedingly narrow view of the First Amendment limits on the government's ability to impose conditions on research grants and contracts provided to private universities. It also suggests that, if a private university does not like any such conditions, it can simply decline to accept federal funding. U.S. Br. 16. *Amici* strongly disagree on both counts. They submit this brief to explain why the government's articulation of the relevant legal standard is incorrect and why private research universities like *amici* cannot simply reject federal funding without imperiling their very nature.

SUMMARY OF ARGUMENT

The United States defends the Solomon Amendment in part on the argument that conditions on receipt of federal funding violate the First Amendment "only when Congress aims 'at the suppression of dangerous ideas.'" U.S. Br. 41 (quoting *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587 (1998)). That position is incorrect as a matter

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[2] Cornell University is a private research university and also the land-grant university for the State of New York.

of law, and, if adopted by this Court, would threaten grave damage to the nation's institutions of higher education.

The government's position fundamentally misapprehends the scope of the unconstitutional conditions doctrine. At a minimum, this Court's decisions and fundamental First Amendment principles plainly render constitutionally suspect any funding condition that coerces compliance, that intrudes on a university's academic freedom, and that does not relate to the purpose of the grant.

The government also incorrectly presumes that universities that do not wish to comply with funding conditions may simply decline federal assistance. In fact, rejection of federal funds is not a real choice for modern research universities. Such institutions primarily engage in basic research, which is conducted without the goal—and therefore must be funded without the promise—of developing specific marketable products. Only the federal government has the financial incentives and resources necessary to fund such high-risk, long-term research. As a result, federal assistance supplies roughly 60% of university research expenditures. In addition, the partnership between federal funding and basic university research has yielded profound benefits to society, driving major portions of the national economy and supporting military preparedness. Universities, therefore, cannot decline federal funding without fundamentally altering their character and dismantling a significant component of the nation's research and development infrastructure.

Because research universities must accept federal funding, intrusive conditions on that funding would undermine the vital interest in academic freedom. This Court has long recognized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967). Decisions of this Court confirm that academic freedom extends beyond the classroom setting to include institutional choices that "shape [the university's] educational character and mission." *Widmar* v.

Vincent, 454 U.S. 263, 277–279 & n.2 (1981) (Stevens, J. concurring in the judgment); *Grutter* v. *Bollinger*, 539 U.S. 306, 328–329 (2003). Such decisions also emphasize the importance of judicial deference to the university's views of how best to shape its educational atmosphere and to advance its mission. These principles are based on the central role that universities perform in a democratic society, furthering First Amendment values by creating a teaching environment that is not skewed by government constraints.

Viewed in context, there can be little doubt that the Solomon Amendment leaves universities with no choice but to comply—that the law is a command rather than an inducement—and that the conditions it imposes on receipt of a broad array of federal grants and contracts bear no relationship to that funding. Moreover, the law, at least as construed by the government, intrudes on the academic freedom of covered schools more than necessary to serve any interest in recruiting. The Solomon Amendment, for example, does not merely require universities to grant the military fully adequate access to their campuses and students. Rather, it requires that universities receiving federal funds provide military recruiters with access that is "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983. This "equal" treatment rule was intended to prevent universities from "send[ing] a message"—presumably to their students—that is critical of military hiring policy. *FAIR* v. *Rumsfeld*, 390 F.3d 219, 227-228 (3d Cir. 2004).

Whether or not a particular school would choose to deliver such a message, the government's contention that it may use the coercive power of federal funding to prevent a school from doing so should be rejected.

ARGUMENT

Under the Solomon Amendment, a university that does not allow military recruiters access to its student body on terms identical to those afforded other employers must be denied all funds from a broad range of federal agencies. 10

U.S.C. § 983. While *amici* support the military and recognize that a strong relationship between universities and the military is essential to the nation's security, *amici* believe that the government may not encumber the terms of that relationship through unconstitutional restrictions on university research funding.

Amici disagree with, and submit this brief in response to, the position of the United States regarding the scope of the unconstitutional conditions doctrine in the context of higher education. The brief for the United States contends that the First Amendment limits on Congress' Spending Clause power are exceeded, "and the doctrine of unconstitutional conditions is implicated[,] *only* when Congress aims 'at the suppression of dangerous ideas.'" U.S. Br. 41 (quot-*Finley*, 524 U.S. at 587) (emphasis added). Thus, according to the United States, Congress may validly condition acceptance of federal research funds on a private university's compliance with government directives short of those that target "dangerous" speech. If a private university "does not wish to be bound by a funding condition," the government contends, it is free "to decline federal assistance." U.S. Br. 41.

In advancing this argument, the government simply ignores the debilitating consequences to research universities and, more generally, to scientific progress in the United States that such a choice would entail; it fails to heed this Court's repeated admonition that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960); and it fundamentally misconceives the scope of the unconstitutional conditions doctrine. The government's position is incorrect as a matter of law and, if adopted by this Court, would threaten grave damage to the integrity and independence of the nation's universities.

I. THE CONSTITUTION PROHIBITS CONDITIONS ON FEDERAL FUNDING THAT UNDERMINE ACADEMIC FREEDOM AT THE NATION'S UNIVERSITIES

Decisions of this Court refute the government's unduly narrow view of the unconstitutional conditions doctrine—particularly where, as here, vital First Amendment interests are at stake. Under that doctrine, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). Most notably, "[i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* If a condition imposed on conferral of an important government benefit "necessarily will have the effect of coercing the claimants to refrain from" activity protected by the First Amendment, that condition cannot stand. *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958). Otherwise, "constitutional guaranties, so carefully safeguarded against direct assault," would be left "open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion." *Frost* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926).[3]

Conditions on government assistance are subject to particularly stringent scrutiny when they implicate the academic freedom of universities. As this Court observed in *Keyishian* v. *Board of Regents of the University of the State*

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[3] The reliance of the United States on the Spending Clause as a source of Congress' authority to impose "criteria for the receipt of federal funding" (U.S. Br. 40), is a red herring, especially as applied to private funding recipients. The question is not whether Congress possesses a constitutional font of power to legislate, or whether Congress has adhered to the principles (such as fair notice) that apply to conditions on funds received by *States*, *cf. South Dakota* v. *Dole*, 483 U.S. 203 (1987), but whether it has exercised that power in a manner that exceeds First Amendment limits.

of New York, 385 U.S. 589 (1967), academic freedom directly furthers core First Amendment interests because the "[n]ation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Id.* at 603 (internal quotation marks omitted). "Precision of regulation," the Court reasoned, "must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 603-604 (internal quotation marks omitted). This same rigorous approach controls where the government acts through conditions on funding rather than direct regulation. Thus, in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the Court observed that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the government's ability to control speech within that sphere by means of conditions attached to the expenditure of government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Id.* at 200.

The type of funding conditions that the government's position in this case would allow cannot be squared with these principles. Under the rule the government advocates, it could control a university's curriculum by conditioning receipt of federal funds for developing a new laser on the university's agreement to teach Greek and Latin in addition to its other language offerings. The government could condition the receipt of hundreds of millions of dollars of research funding across all fields of study at the university on the school's willingness to admit particular students or to hire particular faculty members, regardless of their academic qualifications. Or, by the government's reasoning, Congress might use the hook of federal funding to require private universities to begin each class during hiring season by informing students of when and where military recruiters will be available for interviews. Because these conditions would not target "dangerous ideas," in the government's view they would present no constitutional problem. Plainly, however, such conditions would undermine both the principle of aca-

demic freedom and the First Amendment values that principle serves.

The government bases its constricted view of the unconstitutional conditions doctrine primarily on *Finley*, but the language on which the government relies—that "in the provision of subsidies, the government may not aim at the suppression of dangerous ideas," 524 U.S. at 587 (internal quotation marks and alteration omitted)—did not purport to declare that the government exceeds constitutional bounds *only* in such a situation. To the contrary, the Court simply addressed the narrow question whether "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake" and concluded that, with limited exception, the government may choose to fund one activity over another based on which activity it believes better serves the public interest. *Id.* at 587-588. Nothing in the *Finley* decision purported to rethink the unconstitutional conditions doctrine, nor did the Court have any reason to address the separate question, at issue here, whether the government may use the threat of the denial of a benefit as a means of coercing the recipient to modify constitutionally-protected activity.

Indeed, in several of the cases on which the government relies, *see Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), this Court stressed that the government's power to condition the receipt of federal funds is particularly limited where the effect of that action is to "distort [the] usual functioning," or interfere with the "accepted usage," of a traditional forum for expression. *Velazquez*, 531 U.S. at 543. That principle underlies this Court's recognition in *Rust* that conditions on funding of universities—"a traditional sphere of free expression . . . fundamental to the functioning of our society" 500 U.S. at 200—is subject to uniquely rigorous scrutiny. *See supra*, at 7.

Without defining the outer boundaries of the unconstitutional conditions doctrine, *amici* submit that this Court's decisions and fundamental First Amendment principles plainly render constitutionally suspect any funding condition that coerces compliance, that intrudes on academic freedom, and that does not relate to the purpose of the grant. In his concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring in the result), Justice Frankfurter defined "academic freedom" as "the exclusion of governmental intervention in the intellectual life of a university." That ideal has limits, and generally is not implicated where the government (quite appropriately) imposes conditions that are reasonably related to the grant at issue and that do not transgress other First Amendment values. But, given the pervasiveness of federal funding of university-level research and education today, the concept of academic freedom would suffer a mortal wound if the government could use the enormous power of federal funding to impose conditions that lack a sufficient nexus to the relevant grants and interfere with the "intellectual life of [the] university." As one commentator observed over a quarter-century ago:

> There is no constitutional duty upon the government to subsidize education. But once the government decides to provide aid, it may not condition receipt of that aid upon surrender of the schools' First Amendment rights without a convincing showing of a clear nexus between the imposition of the condition and the effectiveness of the program itself.... Moreover, because free speech and associational interests of universities are so frequently implicated in federal grants to education, any condition must be measured by an exacting standard.

Philip A. Lacovara, *How Far Can the Federal Camel Slip Under the Academic Tent?*, 4 J. Coll. Univ. L. 223, 237 (1977) (footnote omitted).

As explained in Part II, *infra*, at 11-16, federal funding has become indispensable to the character and mission of private research universities. Without such funding, private universities could not conduct much of the innovative research on which society has come to depend, nor could they continue to attract the very best scientists to train the next generation of graduates. Universities therefore have no real choice but to obey the government's conditions; rejection is not a feasible option.

Yet, as explained in Part III, *infra*, at 16-20, the choice of accepting "governmental intervention in the intellectual life of a university" is also untenable. Although the Solomon Amendment may not allow the government directly to dictate what is taught in the classroom, Justice Frankfurter's admonition in *Sweezy* bears repeating: "[I]nroads on legitimacy must be resisted at their incipiency" because "unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." 354 U.S. at 263-264 (Frankfurter, J., concurring in the result) (internal quotation marks omitted). Any inroad on the ability of universities to determine how best to educate their students and "to provide that atmosphere which is most conducive to" intellectual growth poses a grave threat to the First Amendment. *Id.* at 263 (internal quotation marks omitted).

Finally, as explained in Part IV, *infra*, at 20-24, respondents have argued that the Solomon Amendment intrudes on the ability of universities to shape the atmosphere in which they teach. Indeed, the Solomon Amendment itself is confirmation of the expressive quality of a university's recruiting decisions. Congress amended that enactment in 2004 to require not simply fully adequate access for military recruiters, but access on terms "at least equal in quality and scope" to the treatment afforded other employers. 10 U.S.C. § 983(b). That expansive application of the law is necessary, according to the Department of Defense, because anything less than identical access "sends the message" that the university disapproves of certain aspects of military policy.

FAIR v. *Rumsfeld*, 390 F.3d 219, 227–228 (3d Cir. 2004). Thus, the Department of Defense itself views the Solomon Amendment as a means of limiting expression in the academic environment.

II. Federal Funding Of Academic Research Is Critical To The Mission Of Private Universities And To The Nation's Economy And Security

"Federally supported university-based research is a critically important investment by the nation in its future prosperity and wellbeing." Nat'l Science and Technology Council, *Renewing the Federal Government-University Research Partnership for the 21st Century* 333 (Washington, DC: Office of Science and Technology Policy, April 1999). Since the end of World War II, such research has formed a central component of the nation's larger research and development enterprise, creating vast improvements in "the health, security, and quality of life of our citizens." *Id.* at 336. The partnership between the federal government and private universities has proved "vital to each." *Id.* at 331. Its fundamental alteration, through the federal government's attachment of funding conditions inconsistent with academic freedom, would be highly detrimental to both.

A. The Type of Research Conducted at Private Universities Depends Largely on Federal Funding and Could Not Be Performed Without It

Universities occupy a critical role as the nation's "prime repository of core competency in basic research." Nat'l Science and Technology Council, *supra*, at 333. Basic research, as distinct from applied research, focuses on increasing knowledge and understanding of observable phenomena at a fundamental level, without regard to the practical and concrete application of that knowledge. Universities are the largest performer of basic research in the United States, accounting for more than half of the national total. National Science Board, *Science and Engineering Indicators - 2004*, at 5-8. And for the most part, "university research is 'basic' research." Nathan Rosenberg & Richard R. Nelson, *Ameri-*

can Universities and Technical Advance in History, Research Policy 23:340 (1994). Roughly 75% of the research conducted at academic institutions falls within that category. National Science Board, *Science and Engineering Indicators - 2004*, at 5-5.

The character and focus of basic research render it both uniquely suited to the university setting and uniquely dependent upon robust federal funding. Such research yields profound benefits to society, industry, and government, *see infra*, at 12–15, but the nature and application of those benefits are difficult to predict. Because the product of basic research is "often published in scientific journals and shared among colleagues, it cannot be owned the way someone might own a patent." Federation of American Societies for Experimental Biology, *The Benefits of Biomedical Research, available at* http://www.faseb.org/opa/benefits/. As a result, "[i]t is generally not possible for the benefits of basic research to be captured only by the scientists and institutions that conduct it." *Id.* In addition, there is an inherent time lag between initiation of basic research and commercial application of its results—often as long as 20 years. James D. Adams, *Fundamental Stocks of Knowledge and Productivity Growth*, Journal of Political Economy 98(4): 676 (1990).

Thus, "[u]niversities, in their unending, unadulterated search to know, are uniquely situated to undertake such long-term research without worrying about its commercial application and payoff—a luxury that profit-seeking private industrial firms cannot afford." Richard C. Levin, *The Work of the University* 90 (2003). For the same reasons, only the federal government has the incentive and resources to provide the sustained financial support necessary to conduct that long-term, high-risk research. Donna Fossum et al., *Vital Assets: Federal Investment in Research and Development at the Nation's Universities and Colleges* 6 (RAND Corp. 2004). Were such support to cease, industry funds, which currently supply only 7% of academic research expenditures, would not and could not fill the void. National Science Board, *Science and Engineering Indicators - 2004*, at 5-

12. "If left totally to market forces, basic research would be underfunded since the gains from basic research are shared and the profits may not be captured by private investors." Federation of American Societies for Experimental Biology, *supra*.

Federal funds therefore support close to 60% of basic research conducted at America's universities. National Science Board, *Science and Engineering Indicators - 2004*, at 5-12. With almost two-thirds of support for such research coming from federal sources, universities are in no position simply to decline such funds if the government imposes intrusive conditions on their receipt. The premise of the government's unconstitutional conditions argument is thus fundamentally mistaken; conditioning acceptance of federal funds on compliance with governmental directives is tantamount in this context to direct regulation. A decision by this Court based on the government's position—upholding any conditions on receipt of federal research funds short of those targeted at "dangerous ideas"—would therefore pose grave risks to the institutional autonomy and academic freedom so central to the university's mission. *See infra*, at 16-20.

B. The Research Partnership Between The Federal Government And Private Universities Is Essential To The Nation's Security And Prosperity

The nation's long-term interest plainly lies in continued federal funding on terms that simultaneously promote basic research and respect academic freedom. By any relevant measure, the unencumbered provision of federal funds for university research has been "exceptionally productive." Nat'l Science and Technology Council, *supra*, at 331. The results of that partnership are ubiquitous and indispensable; they touch almost every factor of modern life. The computer on which this brief was written is a descendant of the Whirlwind, the world's first high-speed, general purpose, electronic digital computer, which was developed at MIT with federal funds. MIT, *The Federal Government and the Biotechnology Industry: A Successful Partnership* (1995), *available at* http://web.mit.edu/newsoffice/www/BioStudy

.html. The Internet, now an integral part of society, began as a network of computer science departments funded by the National Science Foundation. National Science Foundation, *The Nifty Fifty*, *available at* http://www.nsf.gov/about/history/nifty50/index.jsp (last updated Jan. 27, 2005). The biotechnology revolution, which has spawned most of the medications on which we depend, emerged from pioneering academic research conducted with funds from the National Institutes of Health. Arthur Kornberg, *Support for Basic Biomedical Research: How Scientific Breakthroughs Occur*, in *The Future of Biomedical Research* 38 (Claude E. Barfield & Bruce L.R. Smith eds., Washington, DC: American Enterprise Institute & The Brookings Institution 1997). Federally funded academic research on fiber optics paved the foundation for the modern telecommunications era. National Science Foundation, *supra*. Indeed, the social value of basic research conducted at America's universities is difficult to overstate: secure credit-card transactions, lasers, doppler weather radar, sign language, even the yellow highway barrels that minimize injuries from car collisions—all of these mainstays of daily life, among many others, likely would not exist without it. *See id.*

These innovations have contributed enormously to the national economy. Studies estimate that roughly one-third of the total value of the NASDAQ market stems from federally funded university-based research. Margo Carmichael Lester, *Federal Funding Spurs Private Innovation*, LARTA Vox (Nov. 3, 2003), *available at* http://www.larta.org/lavox/articlelinks/2003/031103_techxfr-government.asp. In the high-technology sector, where federal funding of academic research is most robust, America is the world leader, accounting for about one-third of global production. National Science Board, *Science and Engineering Indicators - 2004*, at 6-8. And because "U.S. high technology industries have been more successful exporting their products than other U.S. industries, [they] play a key role in returning the United States to a more balanced trade position" in a time of growing deficits. *Id.* at 6-11.

Basic research conducted at universities is also critical to military preparedness and national security. Robust federal funding of academic research emerged after World War II as a solution to demands for rapid advances in military technology, and it continues to serve that function in the post-Cold War era. Then-National Security Advisor Condoleezza Rice emphasized this connection less than two months after the terrorist attacks of September 11, 2001:

> The key to maintaining U.S. technological preeminence is to encourage open and collaborative basic research. The linkage between the free exchange of ideas and scientific innovation, prosperity, and U.S. national security is undeniable. This linkage is especially true as our armed forces depend less and less on internal research and development for the innovations they need to maintain the military superiority of the United States.

National Security Advisor Condoleeza Rice, November 1, 2001, letter to Center for Strategic and International Studies Co-Chairman, Dr. Harold Brown, *available at* http://206.151.87.67/docs/CondiRiceLetter.htm.

In addition to expanding public knowledge and driving the development of new technologies, "the deliberate decision to locate most fundamental research in universities rather than in government laboratories or private research institutes [has] had an equally significant benefit. It enable[s] the next generation of scientists and engineers to receive their education and training from the nation's best scientists and engineers, who are required to teach as they pursue [their] own research." Levin, *supra*, at 91. This integration of research and education has been described as "the hallmark and strength" of the nation's innovation system. Nat'l Science & Technology Council, *supra*, at 336. It not only furthers the university's core educational mission, but also benefits society by ensuring a steady stream of highly trained graduates.

Some of those graduates pursue research careers in universities, replenishing the academy with new talent and

ensuring that future students receive the same innovative training. "But the many who enter industrial employment after graduation take with them invaluable assets—state-of-the-art knowledge obtained by working at the frontiers of science, and experience with the most advanced research tools and equipment." Levin, *supra*, at 91. Universities thus generate human capital that is equally important to the nation's prosperity as the intellectual products of basic research. University students trained with federal funds ultimately "make contributions to public health and safety, national security, environmental quality, agricultural productivity, quality of life, and international economic competitiveness." Nat'l Science and Technology Council, *supra*.

All of these benefits further underscore the coercive effect of conditions on federal funding of basic university research. Universities could not reject federal assistance without altering their basic mission and character, and such a rejection would entail the dismantling of a major part of the nation's research and development infrastructure.

III. Academic Freedom Is Equally Critical To Private Universities And To The Health Of Democratic Society

Because research universities depend on federal funding and cannot, as the government contends, simply "decline federal assistance," intrusive funding conditions threaten the vital interest in academic freedom at institutions of higher education. Such institutions foster an atmosphere of free inquiry that is essential to the national welfare. That function would be severely undermined were the government's position to become the law of the land.

The principle of academic freedom reaches deep into this nation's history, and it emerged in unison with the rise of the research university. As one commentator has noted, "[i]t is no coincidence that the concept of the research university and the idea of academic freedom finally developed simultaneously in the same place, for the two are interdependent." Lacovara, *supra*, at 226.

This Court has long acknowledged that academic institutions must be free to define their mission and to operate subject to relatively minimal external constraints. The roots of that principle trace to *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), which arose at a time when "legislative threats to or attacks on colleges had produced at least stagnation in and often serious injury to the institutions." Bruce A. Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 Ky. L.J. 643, 693-694 (1982). Rejecting a State's power to alter the charter of Dartmouth College and to bring that institution wholly within legislative control, this Court laid the early foundation for what would become the principle of academic freedom, "encourag[ing] the development of 'private' colleges by protecting them from state interference." Mark D. McGarvie, *Creating Roles for Religion and Philanthropy in a Secular Nation: The Dartmouth College Case and the Design of Civil Society in the Early Republic*, 25 J.C. & U.L. 527, 560, 566 (1999).

In the century following *Dartmouth College*, direct interaction between private universities and the State was rare because such universities "received virtually no state or federal support and were subjected to few governmentally imposed legal duties." J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 322 (1989) (footnote omitted). In 1957, however, questions of academic freedom reached the Court in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), prompting a majority of Justices squarely to address and embrace that principle. *Sweezy* involved the conviction of an individual who refused to answer the New Hampshire Attorney General's questions regarding lectures he had given at a state university. The Court invalidated the conviction, declaring that "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Id.* at 250 (plurality opinion). "[A]ny strait jacket upon the intellectual leaders in our colleges and universities," the Court continued, "would imperil the future of our Nation." *Id.* "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new

maturity and understanding; otherwise our civilization will stagnate and die." *Id.* Thus, from its first statements on the subject, this Court has recognized the value of academic freedom not only to universities but also to society.

Sweezy also prompted a concurring opinion by Justice Frankfurter, joined by Justice Harlan, which further emphasized the relationship between the nation's welfare and free academic discourse:

> For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

Id. at 262 (Frankfurter, J., concurring in the result). Justice Frankfurter pointedly denounced governmental interference in the intellectual life of the university, noting that a university "ceases to be true to its own nature if it becomes the tool of Church or State," and articulated the oft-quoted "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 262-263 (quoting the statement of open universities in South Africa).

This Court has repeatedly reaffirmed the key rationales underlying *Sweezy*: the importance of academic freedom to the integrity of the university and the benefit to society of maintaining spheres of intellectual inquiry free from state control. In *Keyishian*, 385 U.S. at 603, the Court reiterated that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *See Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). Such decisions under-

score this Court's long recognition that, in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter* v. *Bollinger*, 539 U.S. 306, 329 (2003).[4]

Another key thread in this Court's decisions is the need for judicial deference to a university's decisions about how it chooses to advance its academic mission. Thus, in *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214 (1985), a student challenged the constitutionality of the university's decision to dismiss him from his program of study. This Court held that when such decisions are attacked, the judiciary "should show great respect for the faculty's professional judgment." *Id.* at 225. A court should overturn the decision only if it reflects "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* The Court has thus established a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*, 539 U.S. at 328; *see id.* ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

The reach of academic freedom in this Court's cases has also extended well beyond the classroom to embrace a university's institutional decisions. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." *Ewing*, 474 U.S. at 226 n.12 (citations omitted). The Court has recognized that decisions occurring outside of the classroom can affect the institutional atmosphere of the university, and "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, ex-

[4] The special status of universities does not, of course, exempt them from generally applicable laws and obligations that do not unduly interfere with academic autonomy. *See University of Pennsylvania* v. *Equal Employment Opportunity Comm'n*, 493 U.S. 182, 199–200 (1990).

periment and creation." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result) (internal quotation marks omitted). Thus, academic freedom is directly implicated by such choices as the criteria a university employs to select its students, *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); *Grutter*, 539 U.S. at 328–329, the extracurricular activities in which the university permits its students to engage, *Widmar* v. *Vincent*, 454 U.S. 263, 277–279 & n.2 (1981) (Stevens, J. concurring in the judgment), and, *amici* believe, the manner in which the university conducts its on-campus recruiting program. All of these decisions "shape [the university's] educational character and mission" and are thus protected by the principle of academic freedom. Byrne, *supra*, at 316.

At base, this Court's sustained regard for academic freedom stems from a fundamental recognition: government control over academic decisions threatens the nation's commitment to free and open exchange of ideas. The university is "the single institution in American society that exists solely to nurture and pursue the values enshrined in the First Amendment." Lacovara, *supra*, at 232. This atmosphere produces "future leaders of the political order" who have "a critical attitude toward authoritarian dogma and . . . tolerance of dissent." Byrne, *supra*, at 296. The university thus plays an essential role in our national life, one that this Court has been careful to protect.

IV. The Solomon Amendment Is An Unconstitutional Condition On Federal Funding

As explained in Part II, *supra*, a private research university does not have a true "choice" to accept or to decline federal funding for the basic research that, in critical respects, enables its mission and character. Rejection would have grave consequences not only for universities like *amici*, but also for the nation's leadership in science and medicine. Indeed, the government has elsewhere conceded that the effect of the Solomon Amendment is to coerce private uni-

versities to accept federal funding on the prescribed terms. *See Burt* v. *Rumsfeld*, 354 F. Supp. 2d 156, 175 (D. Conn. 2005) ("Here, that issue is not in dispute because [the government] has conceded the fact of coercion."). Accordingly, the unconstitutional conditions doctrine requires this Court to approach and evaluate the Solomon Amendment for what it is—a governmental command. If the government could not issue that command directly, it may not impose it in the form of a condition on funding. *See, e.g., Speiser*, 357 U.S. at 526 (government may not offer a coercive benefit "to produce a result which [it] could not command directly").[5]

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[5] *Amici* do not dispute Congress's power to impose funding conditions that are reasonably related to the purposes of a grant. Thus, Congress might, for example, condition funds for laser research on a university's agreement to complete the project within a specified period, to perform the work using certain technologies, or to provide regular progress reports. In addition, there can be little doubt that the government may impose "cross-cutting" (*i.e.*, non-grant-specific) restrictions on the use of federal funds to ensure that those funds are not used (directly or indirectly) to support discrimination or other disfavored activities. Examples of such conditions include laws mandating gender equality in athletics at federally funded institutions, *see, e.g.*, 20 U.S.C. § 1681; *cf. Grove City Coll.* v. *Bell*, 465 U.S. 555, 575-576 (1984), and provisions of the Internal Revenue Code denying tax-exempt status to private schools with racially discriminatory admissions policies. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983). Indeed, the Constitution may affirmatively require the government "to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood* v. *Harrison*, 413 U.S. 455, 467 (1973).

Whatever the reach of this authority, however, it does not apply in this context for a number of reasons. First, the government does not, and cannot, contend that the condition imposed by the Solomon Amendment is related in any manner to the vast array of grants and contracts that must be terminated if a university fails to comply. *See Burt* v. *Rumsfeld*, 354 F. Supp. 2d 156, 175 (D. Conn. 2005) (the government "makes no claim, nor could it . . . , that the condition imposed by the Solomon Amendment is in any way related, let alone reasonably, to the purposes for which the federal funds have been given"). Second, in other contexts, the government may have a legitimate (and perhaps compelling) interest in ensuring that federal grants do not directly or indirectly (by freeing up other university dollars) make the government complicit in some offending conduct, such as racial or sex discrimination. Here, however, there is no such activity at

With the issue thus framed, the Solomon Amendment's effect is unmistakable. As this Court has repeatedly recognized, *see supra*, at 16-20, academic freedom is "a special concern of the First Amendment" and is therefore protected in the same manner as other interests central to that provision. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). And the Solomon Amendment goes far beyond requiring universities to grant the military access to their campuses and students. Specifically, it demands access for military recruiting that is "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983. The reach of this "equal access" requirement, at least as construed by the government, is illustrated by the fact that a university would risk losing its federal funding even if it afforded military recruiters access to its campus and students fully adequate to meet the military's recruiting

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issue; the government does not argue that the Solomon Amendment is necessary to ensure that federal funds do not indirectly support some wrongful conduct. Rather, the government simply seeks to use the threat of the loss of hundreds of millions of dollars of federal assistance to coerce research universities to do that which the government cannot directly require. Third, this is not a case in which the "governmental interest . . . outweighs . . . whatever burden denial of" federal funding would place on private research universities or where the government has adopted the least "restrictive means" to achieve its goal. *Bob Jones Univ.*, 461 U.S. at 604 (quoting *Thomas* v. *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981)). Indeed, the record is devoid of evidence that the government's equal-access principle has in any way advanced military recruiting. *See FAIR* v. *Rumsfeld*, 390 F.3d 219, 235 (3d Cir. 2004) ("The Government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal."). And fourth, unlike the Solomon Amendment, which was specifically amended in order to limit free expression, *see id.* at 227–228 (noting that according to the Department of Defense, the equal-access requirement of the Solomon Amendment was intended to prevent universities from "send[ing] the message" that they disapprove of military policy), generally applicable anti-discrimination conditions such Titles VI and IX are in no way designed to affect speech. *Cf. Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623–624 (1984) (upholding discrimination ban in part on the ground that it "does not aim at the suppression of speech" and lacks the "purpose of hampering [an] organization's ability to express its views").

needs.[6] Thus, for example, a university that arranged for military recruiters to conduct individual interviews with every interested student, at times and campus locations convenient to the military recruiters, would violate the "equal access" principle if the arrangements differed from those used for other employers.

As the Department of Defense has explained, the object of the Solomon Amendment's "equal access" principle is not simply to ensure that the military has adequate access to campuses, but to prevent universities from "send[ing] [a] message"—presumably to its students—through any sort of differential treatment of the military in the recruiting process. *FAIR*, 390 F.3d at 227–228; *see also Burt*, 354 F. Supp. 2d at 178 n.22. The consequences for academic freedom are stark. Under the "equal access" requirement, a university that chose to host military recruiters in a fully adequate and accessible building across the quadrangle from other recruiters, as a means of expressing the university's opposition to the military's "don't ask, don't tell" policy, would risk losing its federal funding.[7]

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[6] The actual reach of the Solomon Amendment, however, is less clear than the government suggests. The law, for example, applies only to "access to students . . . on campuses," 10 U.S.C. § 983(b)(1), yet the government has sought to apply it to recruiting that occurs off campus, *Burt*, 354 F. Supp. 2d at 172-173. Similarly, the government itself characterizes the Solomon Amendment as imposing an "equal access" rule for military recruiters (U.S. Br. 16), but simultaneously maintains that the law requires preferential treatment for military recruiters on the ground that, unlike all other recruiters, they need not comply with a school's generally-applicable nondiscrimination policy.

[7] The government also incorrectly asserts that "the Solomon Amendment is aimed solely at an institution's *conduct* in denying equal access to military recruiters" and "is entirely indifferent to an institution's reason for denying equal access." U.S. Br. 42 (emphasis in original). To the contrary, Congress has elevated some reasons above others, allowing differential treatment of military recruiters where the institution "has a longstanding policy of pacifism based on historical religious affiliation," 10 U.S.C. § 983(c)(2). The Solomon Amendment is based on the implicit judgment that other reasons are less valid.

Even a university prepared to give the military fully adequate access is thus presented with the untenable choice of either bending to the government's demand that it not "send[] [a] message" critical of military hiring policy or losing potentially hundreds of millions of dollars of federal funding necessary to a broad array of unrelated research and educational initiatives. Such a choice necessarily compromises a university's academic freedom and therefore imperils "a traditional sphere of free expression . . . fundamental to the functioning of our society." *Rust*, 500 U.S. at 200. The government has not established a need for the untenable consequences this choice entails.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
DAVID A. O'NEIL
CAREY BOLLINGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for amici Columbia University, Harvard University, The University of Chicago, and Yale University

(ADDITIONAL COUNSEL LISTED ON INSIDE COVER)

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF LAW PROFESSORS AND LAW STUDENTS IN SUPPORT OF PETITIONERS

DANIEL POLSBY
Dean, George Mason University School of Law
NELSON LUND
JOSEPH ZENGERLE
Professors of Law, George Mason University School of Law

Of Counsel for Amicus Curiae

ANDREW G. MCBRIDE
Counsel of Record
WILLIAM S. CONSOVOY
SETH M. WOOD
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amicus Curiae

July 18, 2005

195497

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are law professors and law students who support petitioners and oppose the practice of prohibiting military recruiters from meeting with law students on campus.

Amicus Lillian R. BeVier is the John S. Shannon Distinguished Professor of Law at the University of Virginia School of Law.

Amicus William C. Bradford is an Associate Professor of Law at Indiana University School of Law – Indianapolis.

Amicus Kingsley R. Brown is a Professor of Law at Wayne State University Law School.

Amicus Lloyd Cohen is a Professor of Law at George Mason University School of Law.

Amicus John L. Costello is a Professor of Law at George Mason University School of Law.

Amicus George W. Dent, Jr. is the Schott-van den Eynden Professor of Law at Case Western Reserve University School of Law.

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1. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *Amici* law professors and law students state that no counsel for a party has written this brief in whole or in part and that no other person or entity, other than *Amici* law professors and law students, or their counsel has made a monetary contribution to the preparation or submission of this brief.

Amicus Robert A. Destro is a Professor of Law and Co-Director and Founder of the Interdisciplinary Program in Law & Religion at The Catholic University of America Columbus School of Law.

Amicus Michael Distelhorst is a Professor of Law at Capital University Law School.

Amicus Stephen G. Gilles is a Professor of Law at Quinnipiac University School of Law.

Amicus Lino A. Graglia is the A. Dalton Cross Professor of Law at the University of Texas Austin School of Law.

Amicus Hugh Hewitt is a Professor of Law at Chapman University School of Law.

Amicus D. Bruce Johnsen is a Professor of Law at George Mason University School of Law.

Amicus Charles N.W. Keckler is a Visiting Assistant Professor of Law at George Mason University School of Law.

Amicus Douglas W. Kmiec is a Professor of Law and holds the Caruso Chair of Constitutional Law at Pepperdine University Law School.

Amicus Kris W. Kobach is the Daniel L. Brenner/UMKC Professor of Law at the University of Missouri-Kansas City School of Law.

Amicus Michael I. Krauss is a Professor of Law at George Mason University School of Law.

Amicus Gary S. Lawson is the Abraham & Lillian Benton Scholar and Professor of Law at Boston University School of Law.

Amicus Gregory E. Maggs is a Professor of Law at The George Washington University School of Law.

Amicus Phillip L. McIntosh is an Associate Dean and Professor of Law at Mississippi College School of Law.

Amicus Andrew P. Morriss is the Galen J. Roush Professor of Business Law and Regulation at Case Western Reserve School of Law.

Amicus Thomas E. Plank is the Joel A. Katz Distinguished Professor of Law at the University of Tennessee College of Law.

Amicus Sean Ploen is a Lecturer in Law at Boston University School of Law.

Amicus Stephen B. Presser is the Raoul Berger Professor of Legal History at Northwestern University School of Law.

Amicus Glenn Harlan Reynolds is the Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee College of Law.

Amicus Ronald J. Rychlak is the Mississippi Defense Lawyers Association Professor of Law and Associate Dean for Academic Affairs at the University of Mississippi School of Law.

Amicus Clinton W. Shinn is an Associate Professor of Law at the Mississippi College School of Law.

Amicus Stephen F. Smith is an Associate Professor of Law at the University of Virginia School of Law.

Amicus Robert F. Turner is Co-Founder of the Center for National Security Law at the University of Virginia School of Law.

Amicus David M. Wagner is an Associate Professor of Law at Regent University School of Law.

Amicus William A. Woodruff is a Professor of Law at Campbell University School of Law.

Amicus John Choon Yoo is a Professor of Law at the University of California Berkeley School of Law.

Amicus Todd J. Zywicki is a Professor of Law at George Mason University School of Law.

Amici law students are: Andrew Almonte; Sharon Atkinson; Matthew Lee Baldwin; Sarah Band; Susan Bernabucci; Charles W. Blanchard; Michael R. Carney; Vincenza Grazia Castiglione; Mark Champoux; Vincent Chiappetta; Anthony G. Cotto; Cary B. Davis; Elliott Marc Davis; C. Wallace DeWitt; Benjamin Diliberto; Tracy Leigh Dodds; Igor Dubinsky; Michael L. Eaton; Judah Eisner; Trent England; Christopher T. Greco; Michael J. Gridley; Robert A. Hall; Sean Hayes; Laura C. Henderson; Justin David Heminger; Clayton Holland; Scott R. Hovey; Lowell Jacobson; Christian R. Jenner; Orrin Jeffrey Harris Johnson; Andrew King; Erica Little; Leland R. Marcus; Steven E. Martin; Thomas F. Martin; Charles V. Maurer III; Daniel C. McAlpine; Hugh D. McKillop; Gregory S. McNeal; Daniel J. Murphy; Joseph Christian Obenshain; Colin P. O'Dawe; Peter Ostrom; Benjamin F. Rikkers; Bonnie P. Rust;

Ben Shapiro; Peter B. Siroka; Brett A. Shumate; Brian J. Sullivan; Daniel J. Sullivan; Adam Steiner; Jackson A. Stephens; Zack Streit; Brett J. Talley; Ryan Warden; and Tracye Winfrey.[2]

Respondents assert a constitutional entitlement to violate the Solomon Amendment by excluding military recruiters from law schools while continuing to receive federal funds that were expressly conditioned on equal treatment of the United States military in the on-campus interview process. The United States Court of Appeals for the Third Circuit held that the Solomon Amendment unconstitutionally burdened respondents' First Amendment rights. In fact, the Solomon Amendment is a simple and unambiguous condition on the privilege of receiving federal funds; it inflicts no constitutional harm on respondents. Rather, the group whose interests are most severely compromised by the Third Circuit's unauthorized judicial surgery on the Solomon Amendment are law students, who are denied the information necessary to evaluate a legal career in the military.

If the Third Circuit's legal analysis is allowed to stand, *Amici* law students will be deprived of opportunities to acquire first-

2. *Amici* law students attend the following law schools: Benjamin N. Cardozo School of Law; Case Western Reserve University School of Law; Catholic University of America Columbus School of Law; Chicago-Kent School of Law; DePaul University Law School; Georgetown University Law Center; George Mason University School of Law; George Washington University Law School; Harvard Law School; Hofstra University School of Law; New York Law School; Northwestern University School of Law; Roger Williams University School of Law; Stanford Law School; University of Florida Levin College of Law; University of Mississippi School of Law; University of Pittsburgh School of Law; University of Southern California Law School; University of Texas School of Law; University of Washington School of Law; University of Virginia School of Law; and Wake Forest University School of Law.

hand information from military recruiters about potential careers in the armed forces. Moreover, the role of *Amici* law professors in providing professional guidance to students interested in careers in public service will be distorted. The Third Circuit's judgment will also frustrate the core mission of academic institutions – promoting the free and open exchange of ideas. Finally, the Third Circuit's decision will deprive the Nation's armed forces of a diverse pool of candidates for legal careers.[3]

SUMMARY OF THE ARGUMENT

This is a Spending Clause case, as the District Court correctly recognized. *Forum for Academic and Institutional Rights v. Rumsfeld* ("*FAIR*"), 291 F. Supp. 2d 269, (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004). The "Solomon Amendment," 10 U.S.C. § 983(b), merely conditions a university's continuing receipt of federal funds on affording military recruiters the same access to the student body that the school grants to all other prospective employers. The Solomon Amendment thus is a perfectly ordinary contractual condition; no different from any that might be attached to a gift or bequest to an academic institution. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (noting that Spending Clause conditions are "much in the nature of a contract"). Remarkably, the Third Circuit simply ignored the Spending Clause – not even purporting to apply the five-part test for assessing the constitutionality of spending conditions set forth in *South Dakota v. Dole*, 483 U.S. 203, 207-11 (1987).

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3. The legal analysis and conclusions expressed in this brief represent the views of individual *Amici* and do not purport to reflect the position of any law school, university, or other group or association with which the individual *Amici* may have an employment, membership, or other relationship or connection.

Instead of simply adhering to the *Dole* inquiry, the Third Circuit's decision "confuses motive with coercion," and thereby erects a legal principle that is grounded in "a philosophical determinism by which choice becomes impossible." *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Solomon Amendment does not prohibit or penalize any school for expressing disagreement with congressional policy.[4] In truth, these law schools want to have it both ways – exclude military recruiters from opportunities accorded to other public and private employers *and* insist that Congress continue to send them federal funds. Such a result deprives Congress of the power to control disposition of federal funds and forces the Federal Government to subsidize conduct that undermines compelling federal interests.

The Third Circuit's analysis cannot be reconciled with this Court's decisions. Such reasoning would convert the federal statute at issue in *Dole* into an "unconstitutional condition" that impinged on South Dakota's Twenty-First Amendment right to establish the minimum drinking age without federal interference. Likewise, despite this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), Title VI and Title IX would, under the panel's reasoning in *FAIR*, violate the First Amendment right of universities to control their "expressive associations" in

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4. Respondents are motivated by antipathy toward a federal statute the constitutionality of which respondents do not challenge. *See* 10 U.S.C. § 654(b) (defining eligibility for military service); *see also FAIR*, 390 F.3d at 250 (Aldisert, J., dissenting) (citing *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996)) (explaining that the federal courts have repeatedly upheld the constitutionality of Congress' statutory separation policy). *Amici* do not take any position with regard to the policy's merit. However, this case is no more about homosexual rights than *Dole* was about age discrimination.

admissions, hiring, sports teams, and educational programs.[5] The Third Circuit's decision improperly deprives Congress of an important tool to encourage – but not command – conduct consistent with federal policy and would place important anti-discrimination laws, such as Title VI and Title IX, in serious legal jeopardy.

Even if the Spending Clause did not resolve this case, and even if the Solomon Amendment were an affirmative mandate to provide on-campus access to military recruiters, it would still not violate the First Amendment right to expressive association. The Third Circuit's reliance upon this Court's decisions in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), is wildly misplaced. *Dale* and *Hurley* illustrate that forced *membership* in an expressive association can raise First Amendment concerns. Allowing a governmental employer temporary access to a competitive recruiting forum is at the opposite end of the spectrum from *Dale* and *Hurley*. No one understands job fairs and interview weeks as fora of expression for the law schools. Rather, they create an opportunity for the students to receive and evaluate first-hand information about various careers.

The Third Circuit's farfetched conclusion that this limited access amounts to a "forced" endorsement of every nuance of military employment policy displays a singular lack of understanding of the forum involved and the scope of the Solomon

5. The Solomon Amendment certainly is more limited in scope and much further removed from the expressive activities at the core of academic freedom than the sweeping bans on race and sex discrimination contained in Title VI of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2004d-4a, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

Amendment itself. *FAIR*, 390 F.3d at 239. Like the California statute upheld by this Court in *Pruneyard Shopping Center v. Robins*, 447 US. 74, 86 (1980), the Solomon Amendment requires only neutral access, dictates no government message, and allows express disavowal of endorsement by the forum owner. It is hard to see how according military recruiters equal treatment with law firms, state governmental entities, and public interest groups such as the ACLU can be seen as an "endorsement" of any particular military policy.

The Solomon Amendment does not target the content of speech, does not coerce respondents to say or not to say anything, and does not punish any form of expressive association. It does no more than what Title VI and Title IX do – it creates positive incentives for conduct that furthers a compelling governmental interest. Because the Solomon Amendment is aimed at conduct, *viz.*, the selective denial of physical access to campus for recruiting purposes, the Third Circuit should have applied intermediate scrutiny. Under that test, as with the prohibition on burning draft cards, an anti-discrimination principle protecting the important function of military recruiting (particularly in the context of an all-volunteer army) certainly passes muster. *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *see also Univ. of Penn. v. EEOC*, 493 U.S. 182, 200 (1990) (rejecting as "remote and attenuated" the university's claim that application of Title VII to faculty hiring violates the First Amendment). Because the Solomon Amendment would not violate the First Amendment even if it were cast as an affirmative prohibition on discriminatory conduct, *a fortiori* it poses no constitutional problem in its present form, as a condition on the voluntary acceptance of federal educational funds.

Amici respectfully urge this Court to reverse the Third Circuit's decision and uphold the application of the Solomon Amendment to law school recruiting.

ARGUMENT

I. THE SOLOMON AMENDMENT IS A VALID EXERCISE OF CONGRESS' SPENDING CLAUSE AUTHORITY.

This is a routine Spending Clause case. The Spending Clause provides that "[t]he Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. The spending power permits Congress to attach conditions to the receipt of federal funds. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (likening Spending Clause legislation to a contract: "in return for federal funds, the [recipients] agree to comply with federally imposed conditions") (internal quotation marks omitted). Congress thus may employ "the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *see also New York v. United States*, 505 U.S. 144, 168 (1992) (recognizing that the federal spending power is a "permissible method of encouraging a State to conform to federal policy choices"); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 144 (1947) ("The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.").

Congress' "broad spending power" is subject only to the limitations set forth in *South Dakota v. Dole*, 483 U.S. 203, 207-11 (1987). Under *Dole*, a congressional Spending Clause enactment must: (1) benefit the general welfare; (2) place unambiguous conditions on the acceptance of the federal funds; (3) be related to the enactment's purpose; and (4) not contravene an independent constitutional limit on federal power. *Id.* at 207-08. In addition, the Court has suggested that a Spending Clause condition might violate

the Constitution if its operation is overly coercive, effectively giving the recipients of federal funds "an offer they can't refuse." *Id.* at 211. The Solomon Amendment easily passes muster under every prong of the *Dole* inquiry. Nothing in the First Amendment – or any other part of the Constitution – compels Congress to subsidize those whose objective is to undermine a compelling federal objective such as military recruitment.

A. The Solomon Amendment Easily Satisfies the Dole Inquiry.

First, the Solomon Amendment was enacted to benefit the general welfare. *Dole* explained that courts must "defer substantially to the judgment of Congress" when making this determination, 483 U.S. at 207, and that "the concept of welfare or the opposite is shaped by Congress." *Id.* at 208 (quoting *Helvering v. Davis*, 301 U.S. 619, 645 (1937)). Congress enacted the Solomon Amendment in 1994 "on behalf of military preparedness" because "recruiting is the key to an all-volunteer military." 140 CONG. REC. H3861 (daily ed. May 23, 1994) (statement of Rep. Solomon). Given the substantial deference to which Congress is entitled – and Congress' unique obligation "[t]o raise and support Armies," U.S. CONST. Art I, § 8, cl. 12 – the enactment of the Solomon Amendment to ensure military recruiters equal access to law students certainly benefits the general welfare. *See Solorio v. United States*, 483 U.S 435, 447 (1987) (stating that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged") (internal quotation marks omitted) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986)); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.").

Second, the Solomon Amendment places unambiguous conditions on the acceptance of the federal funds. This Court has consistently held that clear federal requirements enable the recipient to understand the consequences of accepting federal funds and make a knowing waiver of any constitutional right the Federal government designates as conditioned by acceptance of the grant. *See Dole*, 483 U.S. at 207-08; *New York*, 505 U.S. at 172. "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). For example, the Court upheld the federal drinking-age restrictions in *Dole* after concluding that "the conditions could not be more clearly stated." 483 U.S. at 207-08.

Here, the Solomon Amendment's plain language notifies the law schools that denying military recruiters equal access to students will result in the loss of some federal funds. *See* 10 U.S.C. § 983(b).[6] Like Title

6. The Solomon Amendment provides that:

> No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents–(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer[.]

10 U.S.C. § 983(b)-(b)(1).

IX,[7] the Solomon Amendment withholds federal funds from those academic institutions that deny equal access to a certain class of individuals. *See Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) ("We conclude, therefore, that the Department may properly condition federal financial assistance on the recipient's assurance that it will conduct the aided program or activity in accordance with Title IX and the applicable regulations.").[8] Congress has spoken with an unmistakably clear voice.

Third, the Solomon Amendment bears the necessary relationship to the distribution of these federal funds. *Dole*, 483 U.S. at 207; *see also United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.") (citation omitted); *New York*, 505 U.S. at 167 (requiring only that the conditions "bear some relationship to the purpose of the federal spending").

As explained above, like Title IX, the Solomon Amendment conditions the receipt of some federal funds granted to academic institutions on a law school's agreement to refrain from discriminating against a particular class of individuals. *See* 10 U.S.C. § 983(b). Congress has the right to ensure that

7. Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a).

8. Congress later superseded an aspect of *Grove City* not at issue here. *See* 42 U.S.C. § 2000d-4a(1)(a) (enacting a more expansive definition of "program or activity" to prohibit discrimination throughout an entity if any part of the entity receives federal funds).

federal funds are not subsidizing discrimination. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 329-31 (1978); *Lau v. Nichols*, 414 U.S. 563, 569 (1974) ((quoting 110 Cong. Rec. 6543 (March 30, 1964) (Sen. Humphrey, quoting President Kennedy's message to Congress, June 19, 1963)); *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1170 (D.C. Cir. 2004). Tying federal funding to non-discriminatory treatment of federal employees obviously passes any "nexus" test. The Solomon Amendment therefore "bears some relationship" to the allocation of the federal funding involved here.

Fourth, the Solomon Amendment does not violate an independent constitutional provision. Importantly, the Spending Clause does not prohibit Congress from conditioning the acceptance of federal funds on the voluntary forbearance of a prerogative that a recipient might otherwise enjoy. *See Dole*, 483 U.S. at 210; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) ("A state may effectuate a waiver of its constitutional immunity by . . . waiving its immunity to suit in the context of a particular federal program."). Quite the opposite, the spending power allows for "the indirect achievement of objectives which Congress is not empowered to achieve directly." *Dole*, 483 U.S. at 210; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (noting that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions"); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 270 (1991) (finding that "indirect encouragement to state action was a valid use of the spending power") (citations and internal quotation marks omitted).

Instead, the "independent constitutional bar" limitation vindicates the "unexceptionable proposition that the power may

not be used to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210; *see also Am. Library Ass'n*, 539 U.S. at 203 n.2 (explaining that the inquiry is "whether the condition that Congress requires would . . . be unconstitutional if performed by the library itself") (internal quotation marks omitted). For example, the Federal Government could not grant federal funds on the condition that recipients engage in racially or sexually discriminatory action or inflict cruel and unusual punishment. *See Dole*, 483 U.S. at 210. There can be no serious argument that requiring universities to grant military recruiters equal access contravenes an independent constitutional provision. *See FAIR*, 390 F.3d at 229 (noting that plaintiffs base their argument instead on the unconstitutional conditions doctrine).

Finally, the Solomon Amendment is not unconstitutionally coercive. *See Dole*, 483 U.S. at 211. Indeed, it is not coercive at all. As the Court explained in *Grove City*, "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." 465 U.S. at 575; *see also Metro. Wash. Airports Auth.*, 501 U.S. at 285 ("Placing conditions on a desire . . . does not amount to compulsion."); *Dole*, 483 U.S. at 211 ("We cannot conclude . . . that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective."). Universities that find it distasteful to comply with eligibility rules governing the disbursement of federal funds can avail themselves of the "simple expedient of not yielding to" the federal demand and reject the federal funds. *Oklahoma*, 330 U.S. at 144 (internal quotation marks omitted); *New York*, 505 U.S. at 168 ("If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.").

B. The Third Circuit Erroneously Characterized the Solomon Amendment as an "Unconstitutional Condition."

The Third Circuit blithely labeled the Solomon Amendment a "penalty" that unconstitutionally conditions a federal benefit on the abdication of a law school's First Amendment rights. *FAIR*, 390 F.3d at 229 n.9 (stating that "the Solomon Amendment does not create a spending program; it merely imposes a penalty – the loss of general funds"). According to the court, "the Government may not propose a penalty to produce a result which [it] could not command directly." *Id.* at 229 (internal quotation marks omitted) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The Third Circuit misapprehended the Solomon Amendment in two important respects.

First, the Third Circuit assumed, without any explanation, that Congress could not achieve the goals of the Solomon Amendment through an affirmative ban on discrimination against military recruiters. *See id.* at 229. That assumption ignores this Court's repeated holdings that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *O'Brien*, 391 U.S. at 377; *see also Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) ("Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked."); THE FEDERALIST No. 23, at 143 (Alexander Hamilton) (E. Earle ed., 1938) ("[I]t must be admitted . . . that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any manner essential to its efficacy – that is, in any matter essential to the formation, direction, or support of the NATIONAL FORCES.").

Given Congress' decision to maintain an all-volunteer army, protecting the military's right to equal treatment as a potential employer could be viewed as every bit as critical to the effective muster of forces as the draft card was in the context of conscription. *O'Brien*, 391 U.S. at 382. The Third Circuit's failure to consider this necessarily antecedent question is blatant error.

Second, the conditions the Solomon Amendment places on the acceptance of federal education funds are not in any sense a "penalty." They are not in the nature of a civil or criminal fine, a provision requiring the forfeiture of existing assets, or even civil punitive damages. Breach of the condition results in a loss of *future federal grants*. If the Solomon Amendment's funding condition is a "penalty," then so are the conditions Title IX places on funding recipients' equal treatment of female students. *See* 20 U.S.C. § 1681(a). Simply labeling the Solomon Amendment a penalty does not make it so.[9]

Dole and its progeny expressly permit Congress to use its spending authority to achieve federal policy objectives that lie beyond Congress' enumerated Article I authority. 483 U.S. at 207 (concluding that "objectives not thought to be within Article I's enumerated legislative fields . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds") (internal citations and quotation marks omitted);

9. That the Solomon Amendment is codified in a distinct provision, or was enacted sometime after the federal funds were originally allocated, is immaterial. *See, e.g.*, 42 U.S.C. § 2000d-4a (1988 amendment to Title VI of the 1964 Civil Rights Act that expanded the scope of Congress' spending power with respect to educational institutions). Congress can obviously begin funding a program and later decide that certain conduct is to be promoted or discouraged within the programmatic area. The Spending Clause does not limit Congress to the funding conditions tied to the first appropriations bill to address the subject matter.

see also Metro. Wash. Airports Auth., 501 U.S. at 270 (finding that "indirect encouragement to state action was a valid use of the spending power") (citations and internal quotation marks omitted). Congress' use of its spending authority to advance the cause of civil rights is but one such example. *See e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 185-186 (2002) ("Title VI invokes Congress's power under the Spending Clause to place conditions on the grant of federal funds.") (citation omitted); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (noting that the Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause").

If it were not for this settled understanding of the scope of the federal spending power, forcing South Dakota to forego its Twenty-First Amendment immunity in exchange for federal highway dollars, or forcing a State to forego its Eleventh Amendment immunity in exchange for *all* federal funds, would be equally unconstitutional. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 737 (1999) ("[W]e have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit.") (citation omitted); *Dole*, 483 U.S. at 211 ("Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.").

The Third Circuit's idiosyncratic articulation and application of the "unconstitutional conditions" doctrine in this case would undo decades of this Court's Spending Clause jurisprudence. *Compare FAIR*, 390 F.3d at 229 ("[I]f the law schools' compliance with the Solomon Amendment compromises their First Amendment rights, the statute is an unconstitutional condition.") *with Am. Library Ass'n, Inc.*, 539 U.S. at 203 n.2 ("CIPA does not directly regulate private conduct; rather,

Congress has exercised its Spending Power by specifying conditions on the receipt of federal funds. Therefore, *Dole* provides the appropriate framework for assessing CIPA's constitutionality.").

Moreover, this federal spending condition, which essentially erects an equal treatment requirement within a type of "limited public forum," raises none of the concerns present in cases where funding conditions are used to prohibit certain private speech or to distort the usual functioning of an existing medium. *See Legal Servs. Corp. v. Valazquez*, 531 U.S. 533, 542-53 (2001); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375 (1984). Here, the non-discrimination requirement is designed to expand speech and is fully consistent with the scope and purpose of on-campus recruiting.[10]

Thus, the errors in the Third Circuit's analysis are twofold. First, as discussed above, the Third Circuit is wrong about the scope of Congress' Spending Clause power. It is quite clear that Congress can incentivize these universities to engage in or forgo conduct that the Federal Government could not mandate or

10. The "coercion" principle that animates much of this Court's "unconstitutional conditions" doctrine jurisprudence is also noticeably absent from this case. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) ("We see nothing to distinguish this from the coercion exercised in our other unconstitutional conditions cases.") (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Perry v. Sindermann*, 408 U.S. 593 (1972)); *see also Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (en banc), *petition for cert. filed*, 73 U.S.L.W. 3734 (U.S. Jun. 6, 2005) (No. 04-1655) ("[I]n the Spending Clause context, any role that the unconstitutional-conditions doctrine might have in cabining Congress's authority to give funds in exchange for waiving immunity is already part-and-parcel of the standard Spending Clause analysis."). Likewise, satisfaction of the *Dole* non-coercion mandate nullifies FAIR's compelled speech claim.

prohibit under Article I. Second, even if Congressional power beyond the Spending Clause were relevant in this case, Congress could, subject to other specific constitutional or statutory limitations related to the protection of religious belief or expression, ban discrimination against the military in "job fairs" or "employment days" that were otherwise explicitly or practically designated as open by a law school.[11] These errors – along with the erroneous application of strict scrutiny to a content-neutral statute – led the Third Circuit to an application of the "unconstitutional conditions" doctrine that cannot be reconciled with this Court's consistent approach to Spending Clause enactments.

C. The Third Circuit's Rationale Threatens the Validity of Other Federal Anti-Discrimination Laws.

In addition to the serious harm that FAIR's discriminatory ban would inflict on law students seeking to engage with military recruiters and on military recruitment itself,[12] affirmance would

11. Congress was careful in drafting the Solomon Amendment to include an exemption where the "institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2). This case, of course, does not present the question of whether the First Amendment would require this exemption, or a broader one, for religious institutions.

12. As *Amicus* Judge Advocates Association persuasively explains, FAIR's discriminatory policy of restricted access will significantly and irreparably harm the military's ability to recruit and maintain a competent legal officer corps. *See* Brief for Judge Advocates Association as Amicus Curiae in Support of Petitioners at 16, *Rumsfeld v. Forum for Academic and Institutional Rights* (No. 04-1152) (noting that "[o]ver 50% of the new Navy Judge (Cont'd)

also fundamentally undermine longstanding civil rights laws that contain language analogous to the Solomon Amendment. *See, e.g.*, 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"); 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

For example, before this case, it was beyond dispute that FAIR could not successfully assert a right to discriminate against veterans in admissions or employment in order to register protest against military policies. *See, e.g.*, 38 U.S.C.

(Cont'd)

Advocates had their first meeting with Navy personnel during an on-campus interview. Half of the Marine Corps' new Judge Advocates are recruited during their second and third year of law school through on-campus recruiting methods.") (internal quotation marks omitted). Forcing military recruiters to interview students on park benches or to use passive means such as newspaper advertisements or bulletin board announcements will significantly limit their ability to attract quality candidates. Furthermore, the harm from such disparate treatment would increase with each passing year, as the military must recruit a certain number of students into the program to replace those who retire and those who have deployed to support "commanders, U.S. service members, and their families[,] especially considering the 'increasingly challenging recruiting environment' brought about by the Global War on Terror." *Id.* at 11-12 (quoting Report of the Judge Advocate General of the United States Air Force, Presented to the ABA Annual Meeting 1 (Feb. 6-7, 2004)).

§ 4311(a).[13] But following the approach of the Third Circuit, FAIR could next successfully challenge federal protections for veterans under the theory that its rights of expressive association were damaged by being forced to accept statutory burdens that protect veterans from discrimination in employment or law school admissions. Under the Third Circuit's analysis, "forced" student recruiting and employment would certainly be an equally, if not more egregious, "unconstitutional condition."

The same rationale that empowers schools that accept federal funding to disassociate themselves from military personnel therefore would conflict with this Court's precedent and would seemingly permit discrimination against women, *Grove City Coll.*, 465 U.S. 555, or on the basis of race. *Lau*, 414 U.S. at 569 ("The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here.") (citations omitted); *see also Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 606 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975) ("In extending financial assistance, Congress unquestionably has plenary power to impose such reasonable conditions on the use of granted funds or other

13. A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a)

assistance as it deems in the public interest."). The Third Circuit's decision, if affirmed, would undercut these decisions and place federal anti-discrimination statutes in obvious jeopardy.

II. THE SOLOMON AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT RIGHT TO EXPRESSIVE ASSOCIATION.

The Solomon Amendment does not violate the right to expressive association identified in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995). The First Amendment protects the right "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Government action violates the First Amendment when it "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648 (citing *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988)). Accordingly, the "forced inclusion of an unwanted person in a group" may intrude into the internal structure or affairs of an association. *Id.*

This Court has twice found that a "state requirement . . . would significantly burden [an] organization's right to oppose or disfavor" a certain viewpoint. *Id.* at 659; *see also Hurley*, 515 U.S. at 557 (holding that state law violated the First Amendment by "requir[ing] private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey"). The Solomon Amendment, however, does not impact the schools' leadership, membership, or message in the manner of *Dale* and *Hurley* and, as a consequence, implicates fundamentally different endorsement interests.

The state law at issue in *Dale* restricted the Boy Scouts' ability to select its leaders and the individuals who, on an everyday basis, would directly impart values and ideals to the organization's young membership. *See Dale*, 530 U.S. at 641. The Court found that this forced membership "of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform" interfered with the Boy Scouts' ability to advance its policy on sexuality. *Id.* at 655-56.

Similarly, in *Hurley*, the relevant state law required a parade organization to allow a group to march in the parade and to carry an identifying banner objectionable to the parade organizers. *See Hurley*, 515 U.S. at 561. The gay and lesbian group in *Hurley* conveyed, through its organization and means of publicity, a message that conflicted with the parade organizers' message. *Id.* at 570 (noting that the organization "was formed for the very purpose of marching in [the parade,] in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants"). Moreover, the Court found that the forced inclusion in the parade amounted to membership selection. *Id.* at 580-81 (explaining that the gay and lesbian organization "could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members").

Dale and *Hurley* merely illustrate that if the government requires an expressive entity to accept someone as a member or spokesman, the First Amendment might thereby be offended. With respect to some organizations, like the Boy Scouts or a parade organization, membership – or *leadership* – has expressive content. *See, e.g., Hurley*, 515 U.S. at 570. Unlike *Dale* and *Hurley*, however, the Solomon Amendment does not

affect a law school's ability to select its leaders, membership, or message. The Solomon Amendment merely requires a law school that has voluntarily accepted federal funds to provide military recruiters the same access to students that the school provides to other recruiters. *See* 10 U.S.C. § 983(b).

Moreover, affording military recruiters equal access to students – given the countless other potential employers that appear on campus – hardly qualifies as an endorsement of a contrary viewpoint and would not "interfere[] with the [law school's] choice not to propound a particular point of view." *Dale*, 530 U.S. at 654. On-campus law school recruitment is an open forum utilized by dozens – if not hundreds – of private and public interest firms and government employers representing myriad perspectives. *See FAIR*, 291 F. Supp. 2d at 283-84, *rev'd*, 390 F.3d 219 (3d Cir. 2004).[14]

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14. With respect to religious displays, the Court has looked at the *context* of a religious item – oftentimes, simply what surrounds the display – to determine whether a government has endorsed a particular religious belief. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 614 (1989) ("[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the *context* in which the contested object appears") (internal quotation marks and citation omitted) (emphasis added); *see also McCreary County v. ACLU*, No. 03-1693, slip op. 26 (U.S. June 27, 2005) ("We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of *context*.") (emphasis added). Thus, the presence of numerous other employers alleviates any theoretical concern that granting equal access to military recruiters might somehow signify a law school's endorsement of one element of only that recruiter. *See Van Orden v. Perry*, No. 03-1500, slip op. 12 (U.S. June 27, 2005) (holding that the presence of a monument with the Ten Commandments on the Texas State Capitol grounds, among 17 monuments and 21 historical markers, did not violate the Establishment Clause).

It strains credulity to argue that the on-campus presence of one particular organization will confuse or mislead attendees into believing that the school has taken a position contrary to its mission statement. *See Rosenberger v. Univ. of Va.*, 515 U.S. 819, 850 (1995) (noting that the fact that the religious publication competed with 15 other publications with widely divergent viewpoints "significantly diminishe[d] the danger that the message of any one publication is perceived as endorsed by the University"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 395 (1993) (stating that where school property "had repeatedly been used by a wide variety of private organizations . . . there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed"); *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that "[i]n light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place").

Indeed, every factor that led this Court to reject the "forced endorsement" argument in *Pruneyard* is present here. The panel's attempt to distinguish *Pruneyard* in a convoluted footnote, *FAIR*, 390 F.3d at 241 n.23, is singularly unpersuasive. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

In the end, the Solomon Amendment does not affect a law school's ability to select its leaders or membership or lead to any confusion with respect to the law school's point of view. Providing equal access to military recruiters no more endorses Congress' views on any particular subject than it endorses the views of any other potential employer. Before, during, and after

the recruitment occurs, the law school's membership, leadership, and message remain unchanged.[15]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DANIEL POLSBY
Dean, George Mason University School of Law
NELSON LUND
JOSEPH ZENGERLE
Professors of Law, George Mason University School of Law
Of Counsel for Amicus Curiae

ANDREW G. MCBRIDE
Counsel of Record
WILLIAM S. CONSOVOY
SETH M. WOOD
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
Counsel for Amicus Curiae

15. Moreover, even if this case impinges on some First Amendment right, it does so only incidentally and easily satisfies the intermediate scrutiny standard articulated in *O'Brien*, 391 U.S. at 376. Recruiters in general, and military personnel in particular, aim to convince students to join or show interest in their organization. Any intrusion on a law school's First Amendment interests therefore is trivial and incidental to this legitimate goal. Additionally, the military has a significant — indeed compelling — governmental interest in having direct access to students at law schools. The ability to interact directly with students in a manner equal to that of other non-military recruiters is essential to maintaining a necessary and superior officer corps. *See supra* n.12. Consequently, to the extent the Solomon Amendment incidentally affects any First Amendment rights, the military's significant interest in competing on equal footing with private employers easily satisfies the *O'Brien* test. *See* 391 U.S. at 376-77; *see also Univ. of Penn. v. EEOC*, 493 U.S. 182, 200 (1990) (rejecting university's claim that Title VII, as applied to faculty hiring, violated the First Amendment).

(22)

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IN THE

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DONALD RUMSFELD, *et al.*,
Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF NALP (THE NATIONAL ASSOCIATION FOR LAW PLACEMENT), SYRACUSE UNIVERSITY, AND INDIVIDUAL LAW SCHOOL PROFESSORS AND ADMINISTRATORS, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

SAM HELDMAN *
HILARY E. BALL
GARDNER, MIDDLEBROOKS, GIBBONS, KITTRELL, OLSEN, WALKER & HILL, P.C.
2805 31st St. NW
Washington DC 20008
(202) 965-8884

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTERESTS OF *AMICI*

NALP, the association for legal career services professionals, was founded in 1971 as the National Association for Law Placement.[1] It is a membership organization dedicated to facilitating legal career counseling and planning, recruitment, and retention, and to the professional development of law students and lawyers. Its membership includes more than 950 public and private sector legal employers (including law firms large and small, as well as many branches of local, state

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[1] No counsel for any party authored this brief in whole or in part, and no one but *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to this filing are on file with the Clerk.

and federal government) and approximately 200 law schools (among them virtually every ABA-accredited law school). Its members are integrally involved in the processes of recruiting and placement of law school graduates. NALP has an unequivocal and longstanding non-discrimination policy that includes sexual orientation, and insists upon adherence to fair and non-discriminatory access in legal recruitment. NALP has an interest in ensuring that the Court is fully informed as to the nature of the recruiting and placement process, and is uniquely situated to assist in that regard. NALP also has an interest in helping law school career services professionals retain the freedom to perform their jobs in accordance with the values that are central to the schools they serve. Finally, NALP has an interest in helping to eradicate discrimination within the employment opportunities that are available to law students and graduates.

Syracuse University has an interest in this litigation, as an institution of higher learning that adheres to policies and practices of non-discrimination. The University consists of thirteen schools and colleges, including a College of Law. The University is committed to the equal access and full participation of all members of its community. In this regard, Syracuse University and its constituent schools and colleges do not discriminate on the basis of race, creed, color, gender, national origin, religion, marital status, age, disability, veteran's status, sexual orientation, gender identity, and gender expression. The University's non-discrimination policy applies to admissions, employment, and access to and treatment in programs, services, and activities, including recruitment by prospective employers at the College of Law and the other colleges and schools. To compel the University to assist military recruiters, despite the military's discrimination on the basis of sexual orientation, would violate the University's non-discrimination policy. Therefore,

Syracuse University seeks to uphold its non-discrimination policy and vindicate its rights to academic freedom by this appearance as *amicus*.

The individual *amici* are members of the faculty and administration at Cornell Law School in Ithaca, New York. Their interests in participating in this litigation and in joining this brief are three-fold: (1) to express their commitment to their schools' nondiscrimination policy, a policy that the law under review seeks to override; (2) to show their respect and support for those of their students who, because of their sexual orientation, are most directly and seriously affected in an adverse manner by the law under review; and (3) to affirm their solidarity with the efforts and determination of their law schools' placement offices to perform their placement activities in a way that diminishes, rather than fosters, employment discrimination on the basis of sexual orientation. The individual *amici* are Gregory S. Alexander, A. Robert Noll Professor of Law; Eric T. Cheyfitz, Associated Faculty, Cornell Law School, and Ernest I. White Professor of American Studies and Humane Letters, Cornell University College of Arts and Sciences; Karen V. Comstock, Assistant Dean for Public Service; Angela B. Cornell, Lecturer; Patricia G. Court, Lecturer in Law and Assistant Director of the Law Library; Cynthia R. Farina, Professor of Law, Cornell Law School, and Associate Dean of the University Faculty, Cornell University; Richard D. Geiger, Associate Dean of Admissions and Financial Aid; Reg Graycar, Visiting Professor of Law, Cornell Law School, and Professor of Law, The University of Sydney Faculty of Law; Carol Grumbach, Director of the Lawyering Program and Senior Lecturer; Robert C. Hockett, Assistant Professor of Law; Barbara J. Holden-Smith, Associate Dean for Academic Affairs and Professor of Law; Julie M. Jones, Lecturer in Law and Reference Law Librarian; Douglas A. Kysar, Professor of Law; Sheri Lynn Johnson, Professor of Law and Assistant Director of Cornell Death Penalty Project; Mitchel Lasser,

Professor of Law; Risa L. Lieberwitz, Associated Faculty, Cornell Law School, and Associate Professor of Labor Law, Cornell University School of Industrial and Labor Relations; Anne Lukingbeal, Associate Dean and Dean of Students; Estelle M. McKee, Lecturer; Bernadette A. Meyler, Assistant Professor of Law; JoAnne M. Miner, Director of the Legal Aid Clinic and Senior Lecturer; Trevor W. Morrison, Assistant Professor of Law; Annelise Riles, Professor of Law and Director of Clarke Program in East Asian Law and Culture, Cornell Law School, and Professor of Anthropology, Cornell University College of Arts and Sciences; Steven H. Shiffrin, Professor of Law; Gary J. Simson, Professor of Law; Winnie F. Taylor, Professor of Law; and W. Bradley Wendel, Associate Professor of Law.

SUMMARY OF THE ARGUMENT

This brief focuses on three points. Each of them has to do with the nature of the recruiting process at law schools, a topic with which NALP and its members, as well as the other *amici* joining in this brief, are intimately familiar.

First, we discuss the many sorts of things that law school career services offices do to assist employers in the recruiting process. An appreciation of this point is important in order to understand what the Solomon Amendment would (at least on Petitioners' view) require law schools to do at the request of military recruiters, and in order therefore to understand where this case fits within the First Amendment landscape. Petitioners' position logically implies that the Solomon Amendment's "equal access" command would entitle military recruiters to every kind of assistance that is given to any other employer; Petitioners offer no limiting principle short of that. So, this case is not merely about whether military recruiters are allowed to physically enter law school campuses, or even whether they can talk with interested students on campus. Beyond that, the case asks, among other things, whether

military recruiters will be entitled to a substantial amount of resources and assistance from law schools and their career services professionals, even where the military's discriminatory policy against gay and lesbian lawyers is contrary to the values to which the schools are committed. These facts put this case in the heartland of the constitutional prohibition of "compelled speech." Furthermore, the military is seeking what no other employer gets: assistance without compliance with a school's requirement of adherence to a nondiscrimination policy.

Second, we discuss the fact that recruiting consists primarily of speech, and indeed entails a great deal of highly expressive speech on the part of the prospective employer. This speech goes far beyond a mere proposal of a mundane economic transaction (though it is worth noting that even humdrum economic proposals, such as proposals of sales of goods, are "speech"). This point is worth emphasizing, even if it may seem obvious, because the District Court's minimization of the point was important to that court's erroneous denial of a preliminary injunction. Law school career services offices are integrally involved in speech—in facilitating, disseminating, and providing a forum for the speech of recruiting employers and students, and in speech of their own as well.

Third, Petitioners err in arguing that a law school's decision to offer certain recruiting-related services is, in itself, evidence that the military needs those services in order to recruit. Employers of law graduates are not all the same, in terms of the assistance they need from law schools in order to recruit effectively. Some, for instance, need assistance in making law students aware of the employers' very existence. Others, whose name recognition is already high, have other needs. Still others may be able to recruit effectively with little or no involvement by law school career services professionals. So, one cannot assume that the military has a

need for every recruiting-related service that a law school provides. Furthermore, one cannot assume that each school even has a set menu of services that it is willing to provide, or that (if such a menu exists) it is defined by the school's view of what any employer needs; so, Petitioners' argument is based on a false premise in this regard. In the end, even though the military may *desire* affirmative assistance and resources from schools, that is not proof that the *need* is sufficient to justify the impairment of First Amendment interests.

ARGUMENT

Our contribution in this brief is largely factual, about the nature of the recruiting process. We will also point out some ways in which these facts affect the legal analysis. Some of the facts that we address herein are supported by evidence in the record, or are proper subjects for judicial notice. To whatever extent our discussion herein may go beyond the record and the scope of judicial notice, it is based on the extensive and intimate experience of NALP and its members, and of the other *amici*. If the Court were uncertain as to the correctness of any statement herein, the proper outcome would be a remand for further factual development. The Court should certainly not declare the Solomon Amendment constitutionally valid if that conclusion would rest to any degree on an assumption that our statements herein about the recruiting process are incorrect.

I. LAW SCHOOL CAREER SERVICES PROFESSIONALS PROVIDE AN ENORMOUS AMOUNT OF ASSISTANCE IN FORMULATING AND DISSEMINATING THE MESSAGES OF RECRUITERS, FAR BEYOND MERELY ALLOWING THEM TO ENTER THE CAMPUS; REQUIRING THAT AMOUNT OF ASSISTANCE FOR MILITARY RECRUITERS WOULD INFRINGE FIRST AMENDMENT INTERESTS.

Law school career services offices provide an enormous amount of assistance, of various sorts, to employers in the recruiting process. As will become apparent in this discussion, and as will be discussed more directly below, this assistance has to do with "speech." Law school career services offices are integrally involved in facilitating, disseminating, and providing a forum on school property for the speech of recruiting employers, as well as engaging in expressive speech of their own. These facts are important because they demonstrate how very much Petitioners seek to require from law schools that receive federal funds and from those schools' career services professionals, under the rubric of "equal access." Under Petitioners' view of the law, law schools and their staff will be actively involved in disseminating and even helping to craft the expressive speech of the military recruiters. This, in turn, strengthens the argument that the Solomon Amendment is invalid under the doctrines of "compelled speech" and "expressive association." These facts bring this case within the scope of such cases as *Wooley v. Maynard*, 430 U.S. 705 (1977), and differentiate it from cases such as *Johanns v. Livestock Marketing Ass'n*, 125 S.Ct. 2055 (2005); this case is a far cry from a mere tax-like targeted financial assessment that funds speech. These facts further highlight the analogy between this case and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

Petitioners' view is that the Solomon Amendment's standard of "equal access" for military recruiters goes far beyond a mere rule that the gates of the campus must be open. The standard, on their view, goes far beyond a rule that military recruiters must be free to meet at on-campus spots with students who invite them, and even beyond a rule that interview space must be provided on a university's campus if it is made available to other employers. On occasion this point falls out of sight in Petitioners' Brief, as when they argue that the decision of the Court of Appeals "appears to rest on the notion that the First Amendment gives a property owner a right to exclude from its property anyone engaged in expressive activity." (Brief for the Petitioners at 31). And the point certainly falls far out of sight in the briefs of most of Petitioners' *amici*, who tend to frame the case in terms merely of the opportunity to enter campus, or the availability of on-campus interviews, rather than addressing the broader range of services that Petitioners' view of the Solomon Amendment would compel.[2]

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[2] *See, e.g.*, Brief of the Judge Advocates Association at 2-3 ("Denying military recruiters the access needed to conduct on-campus interviews will have a detrimental impact on the Judge Advocate General's Corps . . ."); *id.* at 3 ("Particularly in this time of war, denying military recruiters the access needed to conduct on-campus interviews will have a devastating impact . . ."); *id.* at 12-13 ("[I]t is much easier for the students when employers interview at the law school. By denying equal access, the military is at a competitive disadvantage . . ."); *id.* at 14-20, 24, 26-27, 30 (asserting that on-campus interviews are important to military recruiting); Brief of the American Legion at 3 ("[T]here simply are no adequate substitutes for individualized, face-to-face interactions between the men and women of the military and interested students."); *id.* at 23 (describing "personal interaction with the men and women of the Armed Forces" as "arguably the most important aspect of military recruiting."); *id.* at 24 (arguing that on-campus interviews are important to recruiting); *id.* at 28 (asserting that what is at stake is whether to permit "institutions to ban military recruiters from their campuses"); *id.* at 28-29 (repeating this assertion); Brief of Admiral Charles S. Abbot, et al., at 19 (arguing that "[b]anning military recruiters from campus" is detrimental to recruiting).

But again the right to come onto school property is not the extent of this case by any means. Far beyond that, according to Petitioners, the standard is that military recruiters are entitled upon request to the same level of *assistance* in the various aspects of recruiting that any other recruiter receives. (*See, e.g.*, Brief for the Petitioners at 37 (arguing that a school must provide military recruiters with "conveniently located" interview facilities, dissemination of literature, and affirmative assistance in scheduling interviews, if it provides such things to other employers); Pet. App. 8a (noting the contention by the responsible official at the United States Department of Defense, that universities are required to provide the military with the same level of assistance from their career services offices as is provided to other recruiters)). Once having stretched the phrase "equal access" to include a right to assistance and treatment beyond being allowed on campus, Petitioners offer no limiting principle to their definition. Petitioners' view, by its own logic, is that a law school whose university receives federal funds must give military recruiters every kind of recruiting help that the school gives to some other employer. That is why it becomes necessary to focus on what sorts of help that would entail.

Law school staff facilitate, disseminate, and provide the forum for, recruiters' speech in a variety of ways. Indeed, they make a point of telling recruiters that they are willing to take on that role. The Office of Career Counseling and Placement of NYU School of Law, for instance, tells employers, "If you . . . wish to enhance your on-campus recruiting strategy, we encourage you to get in touch with us. . . . We are always pleased to speak with you about 'Effective Recruiting' practices at NYU School of Law and how you can maximize your efforts on campus."[3] Likewise, Harvard

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[3] <http://www.law.nyu.edu/depts/careerservices/employer/index.html>. This site, and all other web sites cited herein, were last visited Sept. 9, 2005.

Law School tells employers: "[W]e are aware of your needs and are *ready to assist you* with your recruitment efforts at Harvard. . . . We are always happy to sit down with you and discuss ways in which you can *get your message out* to students in an effective manner."[4]

Arranging one-on-one interviews is, of course, a large aspect of the work of law school career services offices. This can involve notifying employers of the days or weeks set aside for interviewing "seasons," inviting and accepting employers' requests to be included in the process, taking students' requests for interviews with particular employers, and scheduling the interviews at times that fit within students' and employers' needs. NYU, for instance, schedules thousands of on-campus interviews per year;[5] other schools do the same. Some law schools host these interviews on campus. Others, however, do not—either because of lack of adequate and appropriate space, or for other reasons. Some schools provide teleconferencing or videoconferencing services to facilitate long-distance interviewing;[6] this literally offers a platform for the recruiter's speech using the school's facilities. Other schools may even go so far as to provide lodging at the school's own expense for recruiters who travel from other cities.[7]

Some employers, in order even to build a sufficient pool of applicants to interview, need to take steps to entice students

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[4] <http://www.law.harvard.edu/ocs/employers/What_We_Do_Recruiting.htm> (emphasis supplied).

[5] <http://www.law.nyu.edu/depts/careerservices/recruiting/index.html>.

[6] Cornell University is an example. *See* <http://www.lawschool.cornell.edu/career/Career.asp?InterviewviaVideoconference>.

[7] Roger Williams University provides this sort of help. *See* <http://law.rwu.edu/Career+Services/Information+for+Employers.htm> ("Please know that any employer traveling to Bristol to interview our students will be hosted at our expense at the Bristol Harbor Inn, overlooking the Narragansett Bay.").

to apply. Employers do this in a number of ways, many of which can involve affirmative assistance by law school career services offices. Some employers, with help from schools, take a sort of "direct mail" approach through campus mailbox systems, by having student mailboxes stuffed with their written recruiting materials; some law schools offer their assistance in this regard.[8] Some schools disseminate to their students periodical "newsletters" or the like, which contain statements by prospective employers.[9] Others post notices of available positions.[10]

Some employers find it appropriate to do even more to "advertise" themselves to the students at some schools; and again many law school career services offices actively assist these efforts. Some employers, for instance, host social receptions to which students are invited; and some schools assist in the scheduling and coordination of these events.[11] Other employers seek the same benefits by hosting information sessions in a setting that is more like a meeting than a social reception; and again law school career services offices often assist in scheduling and coordinating those, and sometimes in providing on-campus space for such meetings. Other employers seek, and obtain, assistance from law school career services professionals in arranging "field trips" of a sort, for law students to visit the employers' offices for a first-hand view of some aspects of law practice.

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[8] Harvard is an example. *See* <http://www.law.harvard.edu/ocs/employers/faqs_general.htm>.

[9] <http://www.law.harvard.edu/ocs/Fall_2004_Employer_Pages/Reaching_Out_to_Students.htm>.

[10] <http://www.law.nyu.edu/depts/careerservices/employer/index.html>; <http://www.law.harvard.edu/ocs/employers/other_recruitment_options.htm>.

[11] <http://www.law.nyu.edu/depts/careerservices/contacts.html>;http://www.law.harvard.edu/ocs/Fall_2004_Employer_Pages/Reaching_Out_to_Students.htm>.

Many schools have recurring "meet the employer nights," or gatherings on campus at which students and employers' representatives can meet in a cordial, low-pressure, event that is more like a cocktail reception than an interview or meeting.[12] These events are, fundamentally, the occasion for speech all around. Petitioners' view of "equal access" would mean that they are entitled, as a matter of statute, to an invitation to every such reception that any school hosts. As noted above, Petitioners have offered no limiting principle for their view of "equal access" that would avoid this consequence. This is, we submit, one good example of what is at stake in the "compelled speech" and "expressive association" aspects of this case: a governmental demand for an invitation to school-sponsored social networking events.

In addition to the things that have been described above, many schools arrange for "job fairs" at which a large number of potential employers set up tables or private spaces. Some of these are on-campus, and some are not. Students can attend these fairs and visit the representatives of the employers that interest them. Schools often exercise a sort of editorial judgment in defining the nature of these fairs and of the set of employers who are invited to participate. Some such fairs, for instance, are meant for "public interest" employers.[13] Others fairs or special interview programs are designed for government entities, or for categories of employers defined by location and/or firm size,[14] and practice

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[12] Northwestern University, for instance, has its "Meet the Employers Night"; an invitation to recruiters is available at <http://www.law.northwestern.edu/career/employers/documents/letter.pdf> (pdf file).

[13] *See, e.g.*, <http://www.law.nyu.edu/depts/careerservices/recruiting/consortium.html>. Other public service career fairs are listed at <http://www.pslawnet.org/cms/index.php?pid=54> .

[14] George Washington University, for instance, holds a "Small and Medium Employer Interview Program," described at <http://www.law.gwu.edu/CDO/Information+for+Students/Recruitment+and+Job+Fair

area.[15] Others are meant for employers seeking students of color.[16] Schools spend substantial resources in creating specialized career fairs of all of these sorts, each ordinarily accessible only to a set of employers defined according to specific criteria.[17]

These fairs offer another good conceptual test for application of Petitioners' view of "equal access," and demonstrate how forced inclusion of military recruiters would impair the "expressive association" that is involved in the composition of such fairs. Petitioners would, one would hope, recognize that they are not entitled to participate in job fairs that are focused on categories of employers that do not include the military (such as fairs for small firms, or for patent firms); this is because the military does not meet the criteria for inclusion.[18] But perhaps Petitioners would press their view of "equal access" so far as to mean that a school would have to sponsor a "JAG fair" or "meet the JAGs night" upon request, if the school sponsored similar events focused on some other categories of employers. Again, the lack of a limiting principle in Petitioners' view is striking.

Even all of the description above is far from an exhaustive list of the programs that law school career services offices

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s/Spring+Recruiting+Programs.htm >.

[15] Loyola University Chicago, for instance, hosts a "Patent Law Interview Program," described at <http://www.luc.edu/law/academics/special/center/intellectual/patent_law.shtml>.

[16] <http://www.law.nyu.edu/depts/careerservices/recruiting/consortium.html>.

[17] A large number of career fairs are listed on NALP's website at <http://www.nalp.org/content/index.php?pid=98>.

[18] Yet by this same token one could argue that the military does not meet the criteria for inclusion in *any* of the career fairs or indeed any of the other programs at issue here, and therefore can fairly be excluded, because one of the criteria is that all these programs are meant for employers who do not discriminate.

create in order to facilitate communication between recruiters and students. Many schools use other methods as well, such as the creation of networks of alumni in certain fields who are willing to discuss their careers with students.[19] In all these ways, career services professionals and the schools they serve use the schools' time, energy, facilities and resources to disseminate recruiters' speech, and to create situations in which recruiters can speak directly to students one-on-one or in larger groups.

Indeed, schools' assistance to recruiters is not simply a matter of some menu of available services. To the contrary, many schools (if not all) are happy to consider novel requests from employers, and to brainstorm with employers to develop new and better ways to facilitate discussions between recruiters and students.[20] Career services professionals engage directly with employers; they speak with employers to *encourage* the employers to recruit at their schools, and they also speak with employers to *teach* the employers how to recruit more effectively. Harvard, as noted above, makes it clear that its career services office is ready and able to counsel an employer on effective recruiting techniques in order to "get [its] message out" to students;[21] and other schools do this as well. Career services professionals can advise employers, for instance, as to which methods of information-dissemination tend to work best for different sorts of employers; a firm with a special practice niche might

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[19] <http://www.law.nyu.edu/depts/publicinterest/career/network/index.html>

[20] One example is Wayne State University, as described at <http://www.law.wayne.edu/current/career_services.html> ("We meet with employers at the Law School and in the community for recruiting purposes as well as brainstorming on law school recruiting, associate retention, and other issues.").

[21] <http://www.law.harvard.edu/ocs/employers/What_We_Do_Recruiting.htm>

be advised to put on one sort of event, while a megafirm might be advised to put on another sort, and a prosecutor's office might be advised to do something of a different nature. Career services professionals can also advise every type of employer as to how best to describe its practice and opportunities in order to stand out from the crowd of other prospective employers; career professionals come to know what the students at their schools most want to know from prospective employers, and how best to reach the particular groups of students who might be the most interested in a particular employer's offerings. Does this sort of advice come within "equal access," in the sense that military recruiters would have the right, at any school whose university receives federal funds, to obtain counseling and advice from career professionals? On Petitioners' view, it would; Petitioners offer no limiting principle by which assistance in scheduling interviews and distributing literature would (as they say) be required, yet the school's assistance in formulating the interviewers' message, in order to reach students effectively, would not.

Career professionals' work also entails a great amount of communication—expressive speech—with students. In groups, and in one-on-one contact, career professionals help students through the process of identifying their interests and their values, and in deciding which prospective employers most likely fit the bill. They can inform students as to which careers might be best for those who are seeking litigation experience early in a career, and which might be best for those seeking less all-consuming work schedules, and so forth. Career professionals also come to know, and can help students in understanding, which types of employment might be harder to obtain given a student's record, and which might be more readily available. Whether Petitioners claim a statutory entitlement that career professionals perform this counseling aspect of their job in a certain way is, at this point, unclear. Does "equal access" require a career service

professional to mention the possibility of a military career to every student who mentions a potential interest in public service? Certainly we would urge that "equal access" does not go that far; but the point shows how difficult it is even to get a clear picture of what the Solomon Amendment requires on Petitioners' view.

All of the above, we submit, demonstrates that law school career offices are active in facilitating, disseminating, and providing a forum for the speech of recruiters who have access to the schools' career programs. Even if this case were only about whether a law school could be made (on pain of a devastating loss of funding) to provide on-campus space for military recruiters, still the intrusion on the school's property, personnel, and facilities would be significant. Even just an on-campus information session would entail, at the very least, the provision of physical space and utilities, and the involvement of staff to arrange for, and oversee, the military's use of the facilities. This burden is important not merely because of the expense involved to the school (though that is legally important too) but also because it would be compelling the school to provide a forum for speech that it would prefer not to facilitate. But Petitioners seek much more than that. The record already shows, for instance, military officials placing demands on schools about such matters as *where* on campus they will do their recruiting interviews, *how much* assistance and of what sort they will receive from school officials, and indeed *which university officials* will do the assisting.[22] As seen above, Petitioners' view of "equal access" would harness a school's career staff

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[22] *See* Declarations in Support of Plaintiffs' Motion for Preliminary Injunction, including the declaration of Susan Appleton and Karen Tokarz (Joint Appendix ("JA") 35-39), the declaration of Erwin Chemerinsky (JA 59-64), the declaration of Richard Matasar (JA 198, and the declaration of Alan Minuskin (JA 218-21).

and resources very significantly in active efforts to assist military recruiters in crafting their message and getting it to students.

II. RECRUITING AT LAW SCHOOLS, BY THE MILITARY AND OTHER EMPLOYERS, IS EXPRESSIVE SPEECH.

We have been speaking, above, of the "speech" of recruiters. Recognizing that recruiting consists largely of "speech" is important in applying the relevant legal doctrines. For instance, the "compelled speech" doctrine is applicable precisely because recruiting consists of speech. The fact that the Solomon Amendment would compel schools to actively promote and facilitate military recruiters' speech—often through speech on the part of the school itself—brings this case within the heartland of the First Amendment.

There should be no doubt that recruiting—at least those aspects of recruiting that take place on-campus or through law school career offices—is composed primarily of "speech" in the normal sense of that word. But, to the extent it is relevant to distinguish between levels of expressiveness in speech—between the humdrum and the more fully expressive—recruiting involves a great deal of expressive speech on the part of the prospective employer. The Court of Appeals was correct in recognizing this, as well as recognizing that this is as true of the military as it is of any other entity. (Appendix to Petition, or "Pet. App.," 27a-29a (section of decision of Court of Appeals titled "Recruiting is Expression.")). A recent quotation from a spokesman for the Department of Defense underscores the point that the military's recruiting is expressive speech. Bill Carr, Deputy Under-Secretary of Defense for Military Personnel Policy, explained the government's position about the matters underlying this case: "We have to go out and find [most military recruits], and anything that gets in the way of *clear*

and open talk compromises our effort. That's why we support the Solomon Amendment, because if we want to *tell our story to people*, and there is a *censorship of our message*, then our costs of doing business rise."[23]

Consistent with the quotation above from Deputy Under-Secretary Carr, Petitioners appear to concede the point,[24] although they try to minimize it. However, the point is worth emphasizing because the District Court went astray by minimizing the extent to which recruiting is expressive speech. (Pet. App. 152a, 154a, 171a ("Any expressive component to recruiting is incidental . . .")). Moreover, the point is important to many of the legal issues in the case. For instance, the expressive nature of the recruiters' speech strengthens the analogy of this case to *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). To the extent that Petitioners and their *amici* may contend that the speech involved in recruiting is merely the proposal of an economic transaction, that is both factually

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[23] "Annals of Law: Sex and the Supremes," The New Yorker, Aug. 1, 2005, p. 35 (emphasis supplied). While agreeing with Deputy Under-Secretary Carr that recruitment consists of "clear and open talk," of the military "tell[ing its] story," and disseminating its "message," we disagree with other aspects of his view. Law schools' enforcement of anti-discrimination policies, and their efforts not to provide affirmative assistance to the government's speech, is a far cry from "censorship." Moreover, as explored further below, there is nothing but the government's *ipse dixit* to show that the refusal to provide such affirmative assistance is a significant stumbling block in the way of effective military recruitment of law students.

[24] Petition, p. 10 (referring to the "speech" of military recruiters and "the statements made by" them); Brief of Petitioners, p. 13 ("when recruiters visit campus they speak for their employers . . ."); *id.* at 14 ("the speech of the [military] recruiters remains the speech of the government and the military . . ."); *id.* at 22 ("military recruiters speak for the military . . ."); *id.* at 33 n.5 ("the speech at issue is government speech . . ."); *id.* at 29 (arguing that military recruiters do not "engage in political or ideological activity").

false and legally misguided. It is factually false because the speech involved in recruiting goes well beyond humdrum matters of economics. And it is legally immaterial because even matter-of-fact proposals of economic transactions (such as the routine business of buying a few mushrooms, *see United States v. United Foods*, 533 U.S. 405 (2001)) are "speech" that invokes the First Amendment's protections.

Expressive speech is not "incidental" to recruiting, as the District Court wrongly stated; it is central. In particular, the type of recruiting most at issue in this case—on-campus recruitment by prospective employers—is richly expressive communication with students, by which employers explain and advocate their vision of the nature and purpose of the legal employment that they offer. Among the on-campus aspects of recruiting that consist of verbal communication from employers are the distribution of written materials (announcing the employer's desire for applicants, or inviting students to social events); the compilation (for students' review) of firm résumés, brochures, answers to questionnaires, and the like, in which employers describe themselves and the jobs they offer; receptions and information sessions at which employers meet with students; and interviews, which are nothing but verbal communication or "speech."

The "speech" of recruiters varies substantially in content from employer to employer. Each recruiter is encouraged to speak in its own unique voice about the unique aspects of the employment that it offers. Thus, for instance, *amicus* NALP itself provides forms as a service to employers, with the explicit purpose of "aid[ing] communication among job seekers, employers, and law schools."[25] These forms, completed by employers, are then compiled in the annual NALP Directory of Legal Employers, which (in addition to being

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[25] <http://www.nalp.org/content/index.php?pid=68>

available online)[26] is maintained in print form at most law schools' career offices. Employers are encouraged to fill out a "NALP form" that "offers employers a thorough yet succinct way to *tell their story* to candidates."[27] Those forms instruct recruiters to use the form to "[t]ell your story" and to "discuss special characteristics of your" firm, company, government entity or public interest organization.[28]

As even this first step in the recruiting process reflects, recruiting entails creative and substantive communication—speech, expression—that is unique to each recruiting employer. Moreover, a prospective employer's verbal communications with students tell much about the beliefs and values of the employer. Therefore, even if one defined "speech" for this purpose as including only those communications that touch upon matters of social or public concern, the expression that takes place in recruiting would meet that test. This is true, again, even at the step of the employer's completing of the NALP form. Some employers dramatically explain their advocacy on issues of public concern.[29] Some law firms, while emphasizing service to clients, also richly express their commitment to pro bono work and particular values.[30] Other firms make a point of emphasizing "quality of life" issues.[31] Others take still

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[26] <http://www.nalpdirectory.com>

[27] <http://www.nalp.org/content/index.php?pid=68> (emphasis supplied).

[28] <http://www.nalp.org/assets/29_0506firm.pdf> (law firm); <http://www.nalp.org/assets/28_0506corp.pdf> (corporation); <http://www.nalp.org/assets/30_0506govt.pdf> (government) <http://www.nalp.org/assets/31_0506pubint.pdf> (public interest organization) (all pdf files)

[29] *See, e.g.*, <http://www.nalpdirectory.com/employerdetails.asp?fscid=P0718&id=1&yr=2005> (ACLU Reproductive Freedom Project).

[30] *See, e.g.*, <http://www.nalpdirectory.com/employerdetails.asp?fscid=F3761&id=1&yr=2005> (Arnold & Porter, Denver office).

[31] *See, e.g.*, <http://www.nalpdirectory.com/employerdetails.asp?fscid=

different approaches; a perusal of the NALP Directory shows each employer speaking in a unique voice, seeking to differentiate itself from others and thereby to attract student applicants.

The JAG Corps of the various branches of the military, like other recruiting employers, take advantage of the NALP form's opportunity to tell their story to students. Each uses the particular expressive approach that it deems appropriate and useful, and these military recruiters' speech goes well beyond anything that could be fairly described as a mere proposal of some economic transaction. The Marine Corps' NALP form warns and inspires: "Your quest to become a Marine Corps' Officer will challenge you [as you] have never been challenged before. You will be pushed to your mental and physical limits to determine whether you have what it takes to lead Marines. It is not an easy road, but, if you succeed, you will be changed forever. Your first and greatest responsibility is leading the world's finest, U.S. Marines under your command."[32] The Air Force's NALP form seeks to inspire with a different approach: "[J]oining The Judge Advocate General's Corps allows an attorney to engage in public service within an institution highly respected by the American public. We firmly believe that our judge advocates make a valuable and lasting contribution to their country."[33] The other branches participate as well.[34]

F3249&id=1&yr=2005> (Dickstein, Shapiro, Morin & Oshinsky, Washington office).

[32] <http://www.nalpdirectory.com/employerdetails.asp?fscid=G0394&id=1&yr=2005>

[33] <http://www.nalpdirectory.com/employerdetails.asp?fscid=G0369&id=1&yr=2005>

[34] <http://www.nalpdirectory.com/employerdetails.asp?fscid=G0437&id=1&yr=2005> (United States Navy); <http://www.nalpdirectory.com/employerdetails.asp?fscid=G0295&id=1&yr=2005> (United States Army).

The NALP Directory is only the beginning of expressive speech by employers in the recruiting process; there is only so much expression that can be fit on such a form, but there are endless opportunities for expression through other avenues. Again, this expression allows each employer to differentiate itself and to attract the students who would likely be the best "fit" with the needs, values, and style of the particular employer. Some employers create and disseminate further written materials. Others have receptions, allowing for more one-on-one or small-group discussion of the employer's opportunities and values in a somewhat informal setting. Most use an interview as part of the recruiting and hiring process, whether on-cs npus or off. Such interviews consist of the employer's expressive speech as well as the student's. Students, of course, query prospective employers about much more than the number of billable hours and the salary. Many students, if not all of them, take an employer's values and style, as conveyed through expressive speech in interviews and elsewhere, as important considerations in deciding on future employment. Some students may be moved most by a prosecutor's explanation of the values served by that type of practice; others find themselves resonating with the speech and values of a public defender's office, or a municipal law department, or a small personal injury firm, or a large firm with a national practice.

Some of these opportunities for speech take place without the assistance of law school staff and without the use of law school facilities. Consider, for instance, the quite impressive internet recruiting presence of the Army JAG Corps, a well-designed, richly expressive series of pages including information about the history of the Corps, discussion of the values that it seeks to promote, and personal testimonials by some current members.[35] But some of this expressive speech,

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[35] <http://www.goarmy.com/jag/index.jsp>

as has been discussed above, draws upon schools' resources, and it is those resources that the Solomon Amendment seeks to harness.

In all of these aspects of recruiters' expression, and more, recruiters are speaking to matters that are of important public concern as well as being important to law students considering employment: employers are offering their vision of the part they think their lawyers should play in the economic and political life of the nation and in our system of justice. Military recruiters likewise richly express the values that military lawyers are expected to further, and the reasons why they believe these values are important to the life of the nation. This, too, is speech and expression in the fullest sense of those words. Therefore, this case cannot be disposed of on the assertion that recruiting is somehow outside the scope of, or at the periphery of, the First Amendment's concerns.

III. PETITIONERS ARE WRONG IN ASSERTING THAT A SCHOOL'S OFFERING OF CERTAIN RECRUITING-RELATED ASSISTANCE IS ITSELF PROOF THAT MILITARY RECRUITERS NEED THAT ASSISTANCE IN ORDER TO RECRUIT EFFECTIVELY.

Once it is recognized that First Amendment interests are implicated and infringed by the Solomon Amendment, the question of necessity becomes critical. Because First Amendment interests are not absolute, they can under appropriate circumstances be overridden by sufficiently compelling public interests. In this regard, the Court of Appeals found it important that Petitioners had presented no evidence that they needed the assistance of law schools in order to recruit effectively. (Pet. App. 23a-24a, 40a, 45a-46a). Petitioners now contend that the absence of such evidence is immaterial, because the level of assistance that they need in order to recruit effectively is defined by the level of

assistance that law schools provide to other employers. (Brief of Petitioners, p. 40 ("When an educational institution [provides various services and assistance to recruiters], it is manifesting its own judgment about what is needed for recruiters adequately to reach potential recruits. And when an educational institution denies those opportunities to military recruiters, while making them available to other potential employers, it is necessarily depriving the military of access that the institution itself views as integral to effective recruiting . . .").

Petitioners' argument on this point is incorrect because it wrongly assumes that every employer has the same needs, and that law schools provide only the things that every employer needs in order to recruit effectively. In fact, the needs of various employers are quite different. Furthermore, law schools often go the extra mile and provide much more than what might be strictly necessary in order to make effective recruiting possible. Law schools' decisions about what facilities and services to provide through their career placement offices do not amount to, and are not formulated as, judgments about what *any* employer—much less *every* employer—needs in order to recruit effectively.

Some employers, for instance, need law schools' assistance in making law students even aware that they exist and that they hire law graduates. This may be the case, for instance, with small private firms, or with certain unique public-sector or public-interest entities. Those entities may, further, make different requests from different law schools; they may ask some schools merely to make their firm résumé or other literature available, while asking other schools to arrange on-campus interview sessions, or to help them identify student groups whose members might be most likely to be interested in those entities' employment opportunities. One can take it as granted, we believe, that the United States military does not need law schools' help in making students aware that the

military exists and that there are lawyers in its ranks; any law student who reads newspapers or watches television will know it. But in any event there is no evidence that the military does have such a need. Other employers may depend heavily on law schools' career fairs, "meet the employers nights" or similar events, of the sorts that have been discussed above. But again, one cannot assume that the military needs assistance of that sort from law schools.

One part of the issue, in regard to the Solomon Amendment, is on-campus physical presence of recruiters to interview or otherwise. Some employers depend heavily on on-campus interviewing or informational sessions, and find it useful beyond that to host on-campus social receptions. Others do not; they find on-campus physical presence unnecessary to their recruiting efforts, or find that the expense exceeds the benefits. Those who do without physical presence include, notably, various arms of the United States government. The Department of Justice, for instance, seems to do little or no on-campus interviewing when it hires entry-level lawyers. Instead, it relies on an on-line application process followed by interviews at its own facilities.[36] Other Departments also seem not to engage in any on-campus recruiting.[37] We know of no suggestion that this recruiting process, with little or no involvement by law schools and no on-campus presence, is ineffective in attracting the best applicants for attorney positions in the federal government. Would such a process bring a sufficient number of the best

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[36] The process is explained on the Justice Department's website, including <http://www.usdoj.gov/oarm/arm/hp/hp.htm> and <http://www.usdoj.gov/oarm/arm/hp/hpfaqs.htm>.

[37] For examples of Departments who describe hiring practices without any indication that they use on-campus interviews, consider the Commerce Department's Office of General Counsel, described at <http://www.ogc.doc.gov/vacancies.html>, and the Solicitor of Labor, <http://www.doi.gov/sol/sohonsup.html >.

applicants to the military as well? The question does not answer itself. It is an issue on which one would want to see evidence, if there was any. But Petitioners offered none.

If one were to make any assumption about the military's needs, in the absence of actual evidence, the more plausible assumption based on the general experience of these *amici* would be that the military would be able to recruit effectively without law schools' assistance and without access to on-campus interviewing space. For most employers, the process of recruiting is in large part the process of differentiating themselves from their competitors in the eyes of students. Law firms and others try to make themselves noticed in a vast field of prospective employers that may all look much alike on the surface; and law school events and law school staff can help a firm in its effort to differentiate itself through its expressive communication. The military, it seems fair to say, has no such trouble in differentiating itself from other prospective employers, with no help from law schools. A firm might get lost in a crowd of firms, but the military stands out on its own as obviously different in various ways from other employment options. The military therefore likely has less need of law school assistance than most other employers do. For similar reasons—and, in addition, because the military has its own office space for interviews in many more cities than even the largest firm—it would seem reasonable to assume that the military has less need of on-campus interviewing facilities than do most employers. Again, it reasonably seems that it is probably easier for the military, than for most employers, to catch the eye of those students for whom it might be a good fit; and for those who might be willing to do all that it takes to join the armed forces, a trip off-campus to learn more is likely not much of a hurdle.

In short, law schools provide a wide range of services to prospective employers. Some employers need some, some employers want others, and some employers need little or

nothing at all. Some schools, moreover, provide assistance that goes beyond what any employer might be said to "need." Some schools might not even think at all in terms of what employers might "need," when deciding what sorts of services to provide to employers. That is, a school might instead focus its thinking on students' interests rather than on what an employer needs in order to find good employees, and a school might therefore offer to employers such things as the school thinks will *entice* them to campus even if that goes beyond what any employer might legitimately need. In that case, Petitioners' proposed equation of "help offered" and "help needed" would be faulty at its core. Furthermore, as noted above, it is not the case that each law school has only a set "menu" of services that it is willing to provide; so, Petitioners' attempt to utilize such a menu as dispositive proof that it needs all services on the menu is, for this reason as well, factually unfounded. In any event, there is certainly no reason to assume that an employer as well-known and large as the United States military needs any level of assistance from law schools in order to attract well-qualified applicants. The absence of evidence on the point therefore supports the decision of the Court of Appeals, because the Solomon Amendment's infringement of First Amendment interests is not justified on this record.

CONCLUSION

The matters discussed herein, together with the reasoning of the Court of Appeals and the arguments of Respondents, demonstrate that this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

SAM HELDMAN *
HILARY E. BALL
GARDNER, MIDDLEBROOKS,
GIBBONS, KITTRELL, OLSEN,
WALKER & HILL, P.C.
2805 31st St. NW
Washington DC 20008
(202) 965-8884

* Counsel of Record

(34)

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DONALD H. RUMSFELD, *ET AL.*

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., *ET AL.*,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENTS

ZACHARY WOLFE
PEOPLE'S LAW RESOURCE CENTER
1725 I STREET, NW, SUITE 300
WASHINGTON, DC 20006
202-265-5965

Counsel for Amicus Curiae National Lawyers Guild

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

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SUMMARY OF ARGUMENT

Cognizant of the level of briefing the Court will be offered in this matter, *amicus* National Lawyers Guild writes separately for a limited purpose. This brief attempts to underscore the significance of the message that is communicated when a school chooses either to abide by or to abandon its non-discrimination policy. It further seeks to provide an appropriate context for evaluating this form of speech.

Law schools are involved in an historic effort to improve the profession's understanding of equality and what it means to conduct oneself in an ethical and responsible manner. Most have concluded that discrimination on the basis of sexual orientation is an unacceptable form of bigotry, and that the school should not associate with anyone who discriminates on that basis. The government must not be permitted to aggressively insert itself into that important debate by forcing law schools either to regress their understanding of the meaning of non-discrimination or to fail to live up to those principles.

INTERESTS OF *AMICUS CURIAE* [1]

The National Lawyers Guild has student chapters at over one hundred law schools, as well as thousands of members who are law professors and legal practitioners. The Guild represents the progressive arm of the profession, and has been advocating for a broader understanding of equality since it was founded in 1937 as the nation's first racially integrated national voluntary bar association. When the Guild formed its Lesbian, Gay,

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[1] All parties consent to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution for the preparation or submission of this brief.

Bisexual and Transgender Committee many decades ago, this was an unusual step in professional associations, and allowed the Guild to publish some of the first treatises on legal issues related to sexual orientation and to continue its work in advancement of a more open and equitable society. The NLG frequently represents LGBT activists and people who have been subjected to unlawful discrimination, and it includes among its members LGBT law students, lawyers, and other legal professionals.

ARGUMENT

I. INTRODUCTION

This case strikes at the heart of some of the most significant ethical challenges presently facing law schools and the profession generally. Lawyers play a critical role in a society that is reevaluating conceptions of equality including its prejudices concerning who is worthy of holding some of the most powerful positions within it, such as lawyers and jurists, who hold a share of the monopoly on the official means for the administration of justice.

The law school experience offers opportunities for the profession to go beyond practical preparation of students for the practice of law, in order to explore and declare not only what the law is but what principles are important to this profession. These principles include an abiding commitment to using law for social good, expansion of opportunities to all, elimination of prejudice, and a dedication to acting ethically and in accordance with one's word.

Through the Solomon Amendment, the government seeks to dictate to academics and legal scholars what they must proclaim to stand for, as well as what law students will experience as they embark on this profession. The Solomon Amendment requires schools to

demonstrate a lack of commitment to principles of non-discrimination or to suffer a loss of vast sums that most schools need in order to carry out their mission. As a practical matter, all but at most a handful of students would have no choice but to attend a law school that does not apply its non-discrimination policy uniformly.[2]

II. THE HISTORIC IMPORTANCE OF NON-DISCRIMINATION POLICIES AND PRACTICES

The gradual incorporation of people who are lesbian, gay, bisexual or transgender (LGBT) into law schools and the legal profession is not occurring in an historical vacuum. Society and the profession now

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[2] If student expenses were to increase to replace federal funding to the school, countless students would find the tuition and fee portion of a university's operating budget to be beyond their means. *See* College Board, *Trends in College Pricing* (2003) at 3, *available on* http://www.collegeboard.com/prod_downloads/press/cost03/cb_trends_pricing_2003.pdf (noting that colleges increase tuition and student fees to replace reductions in governmental funding). The National Institute of Health alone awards billions of dollars each year to universities, with fifty-two schools receiving more than $100,000,000 each last year. *See* National Institute of Health, "NIH Awards to Domestic Institutions of Higher Education by Rank, FY 2004," *available on* <http://grants1.nih.gov/grants/award/trends/dheallinst04 .htm>. The Solomon Amendment would of course forbid funding from other federal agencies as well. "When the Air Force informed the University of Southern California (USC) in May 2002 that USC was not in compliance with the Solomon Amendment, the Air Force stated that 'denial of funding would result in the loss of approximately 300 to 500 million dollars in federal funding to the University.' Yale was told it would lose $350 million. The University of Pennsylvania could have lost $800 million. Harvard estimated a loss of $328 million. For the 2002-2003 academic year, the University of California, Santa Barbara received approximately $91 million, roughly seventy percent of its research budget, from federal funding. A Boston Globe article in November 2002 estimated that the threat of loss to Columbia, Harvard and Yale combined was $1 billion." Lindsay Gayle Stevenson, *Note & Comment: Military Discrimination on the Basis of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment*, 37 Loy. L.A. L. Rev. 1331, 1354-55 (2004) (footnotes omitted).

celebrate the expansion of opportunities, including the ability to practice law, to various historically underrepresented groups including women and people of color. This, of course, was not always the case, and the legal profession was not always on the right side of history.

We need not look far back in history to find different attitudes concerning both critical social issues and the law's relationship to them. As this Court has observed:

> There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. . . . Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. *Hoyt v. Florida*, 368 U.S. 57, 62, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961). These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 896-97; 112 S. Ct. 2791, 2830-31; 120 L. Ed. 2d 674 (1992).

Until relatively recently, law schools reflected the then-prevailing societal attitude that women should remain in the home, and the fear that their entry into the profession would undermine traditional roles:

> When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common

> Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said . . . .
>
> A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although
>
> > "[t]he faculty . . . never maintained that women could not master legal learning. . . . No, its argument has been . . . more practical. If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" *The Nation*, Feb. 18, 1925, p. 173.

United States v. Virginia, 518 U.S. 515, 543-44 (1996) (all except first alteration in original).

Law schools did not readily open their doors to African Americans, either. In this respect, major "firsts" important in professional development did not happen until well into the 20th Century. "In 1921, three men simultaneously became the first African-Americans to serve on law reviews: Jasper Alson Atkins (Yale), Charles Hamilton Houston (Harvard), and William Edwin Taylor (Iowa). In 1924, Clara Burrill Bruce became the first African-American woman on a law review (Boston University)." Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers As Social Engineers*, 47 Stan. L. Rev. 161, 166 (1994). Moreover, while a select few enjoyed a legal education at the most prestigious and progressive schools, as late as "1939, many law schools set the quota for blacks at zero.

Thirty-four of the eighty-eight accredited law schools had policies excluding blacks." *Id.* at 167.

This history discomforts us. We wish our history were otherwise, that enlightened minds had always carried the day in learned professions. Nevertheless, we take pride in the development of the profession's views, which is as much a result of social change as legal analysis.

As described next, attitudes concerning the role and place of LGBT law students likewise are undergoing development in a very significant way at this time. The government should not be allowed to hold back that development.

III. SEXUAL ORIENTATION DISCRIMINATION AND THE CHANGING NON-DISCRIMINATION POLICIES

In his dissent in *Romer*, Justice Scalia referred to a "lawyer class" and a "law-school view of what 'prejudices' must be stamped out." *Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting) (citations omitted). He accused the Court of improperly imposing upon other parts of society its view of what was unacceptable discrimination. Here, however, the government seeks to impose upon the law schools its views regarding acceptable prejudices. The law school community is entitled to develop its own views on this matter and determine that certain prejudices are not acceptable on the law school campus, without coercive interference by the government.

Law schools, in conjunction with both incoming and established members of the profession (including *amicus*), remain in the process of confronting their relationship to and involvement in discrimination against various groups. The discussion above concerning race

and sex discrimination is a history repeated with regard to LGBT lawyers and law students.

For example, in 1972 the Lambda Legal Defense and Education Fund sought approval as a legal assistance corporation in New York. "[T]he Appellate Division denied and dismissed the application." *In re Thom*, 33 N.Y.2d 609, 612; 301 N.E.2d 542, 544; 347 N.Y.S.2d 571, 573 (N.Y. 1973). The New York Court of Appeals reversed. *Id.* Still, on remand the Appellate Division struck one of the organization's stated purposes, which is particularly noteworthy for purposes of the issue under consideration:

> We do not deem it appropriate to lend our approval to paragraph (g) [of Lambda's charter]: "to promote legal education among homosexuals by recruiting and encouraging potential law students who are homosexuals and by providing assistance to such students after admission to law school."

Id. at 42 A.D.2d 353, 354; 350 N.Y.S.2d 1. 2 (N.Y. App. Div. 1973).

Such resistance to openly gay law students was commonplace and persistent, but attitudes gradually changed. Various professional associations began to include sexual orientation as a prohibited basis for discrimination – and they considered that their association with anyone who failed to do so reflected poorly upon them. *See e.g.* Executive Committee of the Association of the Bar of the City of New York, *Discriminatory Admission Policies, available on* <http://www.abcny.org/AssociationGovernance/SelectedResolutions.htm) (declaring "the policy of the Association that none of its meetings and no meetings of its officers, committees or staff be held at clubs whose admission policies are known, or are publicly acknowledged, to be

discriminatory on the basis of sex, color, race, religion or national origin, disability, age, marital status or sexual preference.")

Law schools, of course, came to similar conclusions. Today, essentially all law schools prohibit sexual orientation discrimination by school officials and by anyone receiving the benefits of school-sponsored programs. *See* Bylaws of the Association of American Law Schools, § 6-3, *available on* <http://www.aals.org/bylaws.html> (requiring all member schools to adopt policies prohibiting discrimination on the basis of sexual orientation); Executive Committee Regulations of the Association of American Law Schools, § 6-3.2, *available on* <http://www.aals.org/ecr> (requiring member schools to extend placement assistance or use of school facilities only to employers that comply with such nondiscrimination policies).

Considerable scholarship exists today discussing the continuing challenge to law schools (and other educational institutions) that wish to take seriously a commitment to rooting out prejudices against LGBT members of the community. *See e.g.* Michael R. Siebecke, *To be or Not To Be ... Out in the Academy*, 22 Law & Ineq. J. 141 (2004); Kristian Miccio, *Closing My Eyes and Remembering Myself: Reflections of a Lesbian Law Professor*, 7 Colum. J. Gender & L. 167 (1997); Scott Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian and Bisexual Law Students*, 14 Law & Ineq. J. 555 (1996); *see also* Lisa W. Loutzenheiser and Lori B. MacIntosh, *Citizenships, Sexualities, and Education*, 43 Theory Into Prac. 151 (2004); K. Kumashiro, *Troubling Intersections of Race and Sexuality: Queer Students of Color and Anti-Oppressive Education* (2001); Barbara C. Wallace, *A Call for Change in Multicultural Training at Graduate Schools of Education*, 102 Tchrs. College Rec. 1086 (2000).

In short, many members of the legal profession have concluded that discrimination on the basis of sexual orientation is an unacceptable form of bigotry. They further have concluded that it is unseemly to associate with organizations that discriminate against LGBT students, specifically by offering discriminatory employers use of law school facilities and access to school-sponsored recruitment programs. This is consonant with the profession's ongoing efforts to define and practice principles of equality, and is in the finest tradition of protected political expression.

Through the Solomon Amendment, the government seeks to insert itself into this process and coerce the law school community into either regressing its understanding of the principle of "non-discrimination" or failing to put those principles into practice. This brief next addresses the communicative nature and free speech implications of such a change or abandonment of non-discrimination policies.

IV. A SCHOOL'S COMMITMENT TO NONDISCRIMINATION IS JUDGED ACCORDING TO ACTION MORE THAN EMPTY STATEMENTS.

The response of students and other members of the law school community is instructive when considering the consequence of a school's decision to enforce or not enforce its stated non-discrimination policy.

As one law professor publicly noted, "students may justifiably question the institution's commitment to non-discrimination when they observe it violating its own policy." Shannon P. Duffy, *Law Professors, Students Sue Defense Department*, The Legal Intelligencer, Oct. 2, 2003 (quoting University of Pennsylvania Law Professor Stephen Burbank).

A law student wrote in her law review note that, "[t]he government requires the university to convey a message of partial nondiscrimination by forcing the school to choose its policy or hundreds of millions of dollars in federal funding. . . . The statement 'non-discrimination usually' is quite different from the statement 'non-discrimination always.'" Lindsay Gayle Stevenson, *Note & Comment: Military Discrimination on the Basis of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment*, 37 Loy. L.A. L. Rev. 1331, 1366-67 (2004).

Amicus National Lawyers Guild includes among its members students in organized chapters at over one hundred law schools, as well as law professors and others actively involved in the law school community. Law students today are extremely interested in their schools' commitment to principles of equality and non-discrimination.

Law students infer a troubling message when a discriminatory employer is permitted to recruit through a school-sponsored program. This can lead to confusion, a sense of anger or duplicity, or a desire to counter the message that has been sent by the administration. As a result, law school campuses are the sites of frequent demonstrations by students, faculty and staff who oppose administration policies and practices designed to comply with the Solomon Amendment. *Amicus* offers a few brief selected examples: [3]

- On March 24, 2005, students at the University of the District of Columbia School of Law held a demonstration against military recruitment on campus. Literature circulated in support of the event declared that "[t]he presence at [this school]

[3] The following relates actions by *amicus* itself, documentation of which is on file with counsel.

of recruiters from the Armed Forces is . . . an affront to the principles that the institution holds dear."

- Students at Northeastern School of Law protested during military recruitment and wore buttons supporting full enforcement of the school's non-discrimination policy in 2003. In February 2005, they gagged themselves and distributed flyers in opposition to military recruiting on campus.

- Students at Oklahoma City University Law School issued a statement in 2005 calling upon the administration to take a number of actions, and expressly "recognizing the conflicting interests that Oklahoma City University faces in providing affordable education to students of limited means (through federal financial aid that is contingent on compliance with Solomon) and its stated desire to provide a non-discriminatory equal-opportunity environment."

Although some have suggested that the Solomon Amendment does not implicate free speech concerns because a school is free to "say" whatever it wishes even as it lets discriminatory employers on campus, that third-party-constructed tidy characterization of a school's actions simply does not ring true.

First, as a practical matter, it is inaccurate. The law students' protests against their schools and against the Solomon Amendment represent a visceral reaction to seeing their schools facilitate the goals of a discriminatory employer, which undermines any proclamations of commitment to equality that the schools may offer. Today one might summon the cliché that actions speak louder than words, while the celebrated statesman-philosopher Salon was fond of saying that "speech is the mirror of action." Diogenes Laertius, *Lives*

of Eminent Philosophers 59 (R.D. Hicks, trans., Harv. Univ. Press 1991) (c. 594 B.C.). A cliché and an ancient reference are appropriate here because what is at issue is a simple truth: one communicates through action, and is judged by others accordingly. To say that compelling a school to suspend its non-discrimination policy is not a form of compelled speech is to ignore both the wisdom of the ages and basic common sense.

Second, it is inconsistent with legal principle to suggest that freedom of speech is not offended by the Solomon Amendment because others will know that it is not the schools' true views that are being communicated when it welcomes a discriminatory employer on campus. The irrelevance of such an argument has been plain from the first development of the compelled speech doctrine, when the Court considered a compulsory flag salute:

> It is not clear whether the regulation contemplates that pupils forgo any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by gesture barren of meaning. . . . To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left open to public authorities to compel him to utter what is not in his mind.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943).

Likewise, this Court held that newspapers cannot be compelled to publish replies of political candidates, even though obviously the public would know that it was the newspaper's first editorial, and not the one submitted by the opposing candidate that the paper would be legally

required to publish, that reflected its true views. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Of course, this Court also struck down, on First Amendment grounds, a law that required only "the passive act of carrying the state motto on a license plate." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

The non-discrimination policies at issue here declare that the school does not discriminate on the basis of sexual orientation and does not associate with or facilitate employer recruiting by those who do so discriminate. The Solomon Amendment requires schools to send a contrary message; to fail to comply with its own policies. By all logical and legal reasoning, and especially in the context of the historic importance of developing attitudes and practices concerning discrimination, this constitutes extremely significant expressive communication.

V. THE GOVERNMENT MUST NOT BE PERMITTED TO INTERFERE WITH LAW SCHOOLS THAT ARE ENGAGED IN THIS HISTORIC EXPANSION OF OPPORTUNITIES AND REEVALUATION OF THEIR UNDERSTANDING OF AND COMMITMENT TO PRINCIPLES OF EQUALITY.

We are "a society committed to freedom of thought, inquiry, and discussion without interference or guidance from the state." *Alexander v. United States*, 509 U.S. 544, 575 (1993) (Kennedy, J., dissenting). As discussed above, law professors, school administrators, and other members of the law school community are in the process of rethinking not only the predominant conceptions of equality but what actions a professional ought to take when confronting a situation that she or he believes is inconsistent with principles of equality. This process is at the core of what the First Amendment protects.

The Court has long recognized that the importance of allowing thoughts to develop and to be acted upon without governmental interference is most acute in an academic setting. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. '[I]nhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.'" *Shelton v. Tucker*, 364 U.S. 479 , 487 (1960) (*quoting Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

This is so because schools provide cherished opportunities to reflect upon what has become orthodox and, through thought and action, progress beyond notions that properly should be abandoned. Social progress is slow and difficult, and venues incubating its development are not places for the heavy hand of government. "In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (interpreting the right of privacy in light of cases establishing "the right to educate one's children as one chooses," and the "freedom of inquiry, freedom of thought, and freedom to teach – indeed, the freedom of the entire university community") (*citing Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959), 112; *Baggett v. Bullitt*, 377 U.S. 360, 369 (1964)).[4]

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[4] *Amicus* notes that cases upholding non-discrimination laws do not help the government's case here. The Civil Rights Act and similar statutes exist because of the freedom on the campus and elsewhere to challenge then-prevailing views of the meaning of equality, as discussed above. Legislation codifying these new understandings and efforts to eliminate discrimination are of course compelling governmental interests. *See e.g. Grutter v. Bollinger*, 539 U.S. 306 (2003). The Solomon Amendment is at direct odds with this process.

VI. CONCLUSION

Law school non-discrimination policies that include sexual orientation represent an important expansion of opportunities as well as serious intellectual and practical exposition on the foundational principle of equality. In requiring schools to abandon their non-discrimination policies, the Solomon Amendment imposes government into this historic process. It would require that schools either pull back from this important social development or, perhaps worse still, act inconsistently with those avowed principles. Either is an extremely dangerous proposition, and inconsistent with the First Amendment. This Court should affirm the holding of the U.S. Court of Appeals for the Third Circuit.

Respectfully submitted,

Zachary Wolfe
People's Law Resource Center
1725 I Street, NW, Suite 300
Washington, DC 20006
(202) 265-5965

(9)

No. 04-1152

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In The

Supreme Court of the United States

DONALD H. RUMSFELD, ET AL,
Petitioners.

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioner*

Barry C. Hodge
Counsel of Record for *Amicus Curiae*
Steven W. Fitschen
Colleen M. Holmes
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Legal Foundation (NLF) is a 501 c (3) public interest law firm. The NLF has a vital interest in the proper application of First Amendment principles since most of our litigation concerns these principles. We are particularly interested in assuring that constitutional case law not be improperly invoked by one side of a hotly debated political and social issue to the detriment of all those bound by the resulting court decisions.

SUMMARY OF THE ARGUMENT

This Court should reverse the Third Circuit's decision because the Third Circuit misapplied the unconstitutional conditions doctrine by ignoring binding precedent and holding that the Solomon Amendment impairs Respondents' First Amendment rights under the doctrines of expressive association and compelled speech. Specifically, the Third Circuit analyzed this case under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bosto*n, 515 U.S. 557 (1995), rather than under *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) and *Rust v. Sullivan*, 500 U.S. 173 (1991).

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent accompany this Brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE THIRD CIRCUIT'S DECISION BECAUSE THE THIRD CIRCUIT IGNORED BINDING PRECEDENT.

The District Court in the instant case held, *inter alia*, that the Solomon Amendment did not violate Respondents' First Amendment free speech rights under either the doctrine of expressive association or compelled speech. *See generally Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) (hereinafter "*FAIR*"). The Third Circuit reversed both of these holdings. *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld,* 390 F.3d 219 (3rd Cir. 2004) (hereinafter "*FAIR*").

In so doing, although they came to opposite conclusions, *both* courts applied the wrong lines of cases. As will be explained below, the Third Circuit merely rubber-stamped the District Court's reasoning for rejecting the controlling cases. Therefore, to understand the underlying error, one must look at the District Court's opinion in some details.

The District Court improperly concluded that "the principles established in prior cases applying the doctrine of unconstitutional conditions are too fact-specific to provide an easy or appropriate avenue for analyzing the novel constitutional issues raised by the Solomon Amendment." *FAIR*, 291 F. Supp. 2d at 301. This conclusion cannot stand: The varying facts of each case may require careful analogizing or distinguishing of the *facts* of prior cases. However, the *principles* , *i.e.*, the rules and rationales were binding on the District Court.

In particular, *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) (hereinafter, "*ALA*"), provides the proper framework under which to analyze the instant case. Indeed, the District Court admitted that both the law schools and the Defendants had argued the case under

the "unconstitutional conditions" doctrine as articulated by this Court in *ALA*. *FAIR*, 291 F. Supp. at 298-301.

In *ALA*, the plaintiff libraries, library associations, and individuals argued that two federal programs requiring the installation of Internet filters as a condition of receipt of federal funding constituted both an invalid exercise of Congress' Spending Clause authority and the imposition of an unconstitutional condition. *ALA*, 539 U.S. at 198-213. This Court rejected the first argument under *South Dakota v. Dole*, 483 U.S. 203 (1987), noting that libraries that complied with the filter requirement would not thereby violate the First Amendment. *ALA*, 539 U.S. at 202. This Court rejected the second argument under *Rust v. Sullivan*, 500 U.S. 173 (1991), noting that the libraries would not be denied a benefit because of the exercise of their Free Speech rights. *ALA*, 539 U.S. at 211-12. In the instant case, the law schools make only the second type of claim. Thus, as will be explained below, this case should be decided under the applicable portions of *ALA* and *Rust*.

Contrary to the District Court's view, the principles of *ALA* and *Rust* are simple, straightforward, and easily applicable to the instant case. In contrast, the District Court in this case engaged in an unduly complex analysis. The primary hallmark of its analysis was its refusal to rely upon the cases that guided this Court in *ALA* and instead invoking cases that are clearly out of place. In particular, the District Court's entire analyses of academic freedom and expressive association (including its analyses of message dilution and compelled speech under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)) was unnecessary. *See FAIR*, 291 F. Supp. 2d at 301-14.

The analysis in which the District Court should have engaged would also have led it to the same conclusion that it reached: the Solomon Amendment does not impose an unconstitutional condition upon the law schools, and thus, passes constitutional muster. However, it would have

reached the proper conclusion in a more direct route and under the proper line of this Court's precedent. Similarly, the proper course of action for the Third Circuit would have been to correct the District Court's reliance on *Dale* and *Hurley* and to affirm on different grounds, *i.e.*, under *ALA* and *Rust*.

Before examining the Solomon Amendment under the *ALA* test, we note the inadequacy of the District Court's reasons for declining to employ the test. As noted above, the District Court wrote that "the principles established in prior cases applying the doctrine of unconstitutional conditions are too fact-specific to provide an easy or appropriate avenue for analyzing the novel constitutional issues raised by the Solomon Amendment." *FAIR*, 291 F. Supp. 2d at 301. However, the District Court only noted two differences. First, the District Court stated that in *Rust* and *ALA* a specific government spending "program" was in sight, whereas here, according to the District Court that is not true. *FAIR*, 291 F. Supp. 2d at 300. This reasoning is flawed for several interrelated reasons.

First, in *ALA* two different "programs" were at issue (the E -rate and the LSTA programs). *ALA*, 539 U.S. at 199 (explaining the two programs). Here, it is true that more than two "programs" are at issue. However, there is nothing in this Court's unconstitutional conditions jurisprudence that indicates that the number of "programs" is constitutionally significant. Neither the law schools nor the District Court had any problem describing representative programs. Third Circuit Brief for Appellants at 3; *FAIR*, 291 F. Supp. 2d at 270.

Furthermore, the District Court placed undue importance upon the literal words of *Rust*. The District Court quoted this Court's statement from *Rust* that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *FAIR*, 291 F. Supp. 2d at 299 (quoting with attribution but without quotation marks or pinpoint citation *Rust*, 500 U.S. at 194).

This language makes sense in the *Rust* context since this Court was speaking of the Title X family planning counseling "program." *Id.* at 178. However, in *ALA*, as mentioned, more than one program was at issue and this Court used language more appropriate to multiple programs. It noted that the unconstitutional conditions analysis was applicable to evaluating "receipt of federal assistance," "recei[pt of] . . . subsidies," and receipt of "funds." *ALA*, 539 U.S. at 210. The emphasis was always on the money, not the form of the program nor on the number of the programs.

Furthermore, the distinction that the District Court sought to make appears to be completely erroneous. While not entirely clear in its reasoning, the District Court appears to be contrasting the *Rust* programs with the fact that the Solomon Amendment places conditions on numerous educational grants and contracts. *Cf. FAIR*, 291 F. Supp. 2d at 299-300 with *FAIR*, 291 F. Supp. 2d 270. However, as this Court made clear in *Rust*, Title X also placed conditions on numerous family planning grants. 500 U.S. at 178. To the extent that the District Court was trying to distinguish a narrower category of grants (family planning) from a broader category of grants (those appropriate to the various fields of study at a university), the District Court merely baldly asserted that this is constitutionally significant without citing any authority whatsoever for that proposition.

Another reason why the District Court claimed that *ALA* does not control the instant litigation is because in *ALA* and *Rust* "particular viewpoints which were contrary to the Government's value judgment were entirely suppressed. The Solomon Amendment, by contrast, does not directly or entirely exclude a point of view." *FAIR*, 291 F. Supp. 2d at 300. While this statement is entirely correct, it does not constitute a reason why *ALA* does not control. Rather it merely makes the analysis even simpler.

The District Court's final stated reason for rejecting binding precedent was that it could not tell whether cases

such as *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) were controlling. *FAIR*, 291 F. Supp. 2d at 300-01 ("Whether these cases are controlling depends on whether the Solomon Amendment suppresses speech or substantially inhibits the exercise of other protected rights."). This is not much of a reason to say the least.

The Third Circuit rubber-stamped most of this reasoning and relegated the issue of the supposed inapplicability of *Rust* and *ALA* to a footnote, stating:

> As the District Court noted, the Supreme Court's exception to the unconstitutional conditions doctrine for selective spending programs does not apply here. *FAIR*, 291 F. Supp. 2d at 299-300. When the Government appropriates for a particular spending program, it may endorse one viewpoint over another by conditioning its spending on certain criteria. *United States v. Am. Library Ass'n*, 539 U.S. 194, 211, 156 L. Ed. 2d 221, 123 S. Ct. 2297 (2003) (providing library assistance funds to only those libraries who agree to block obscene Internet sites); *Rust*, 500 U.S. at 192-93 (funding family planning services that eschew abortion counseling). In those cases, "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196; *see also Am. Library Ass'n*, 539 U.S. at 211. That exception does not apply in our case because the Solomon Amendment does not create a spending program; it merely imposes a penalty—the loss of general funds.

FAIR, 390 F.3d at 229 n.9.

Because the Third Circuit relegated the controlling line of cases to a footnote, it failed to realize that those very cases explain why the Solomon Amendment does not impose a penalty. This will be explained below in Part II.

II. THE SOLOMON AMENDMENT DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE LAW SCHOOLS BECAUSE THE SUBJECT PROGRAMS HELP FUND TRADITIONAL EDUCATIONAL FUNCTIONS AND BECAUSE THE LAW SCHOOLS' OBJECTIONS ARE NOT CONSTITUTIONALLY SIGNIFICANT.

As noted above, the analysis in which the District Court and the Third Circuit should have engaged, following this Court's lead in *ALA* is quite straightforward. In *ALA*, this Court quite simply noted that the Internet filter requirement was part of programs designed to "help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes." *ALA*, 539 U.S. at 211. It did not matter at all, constitutionally, that the condition itself was onerous to the libraries, indeed so onerous that they were willing to sue over it. It did not matter that the libraries considered the filters to constitute censorship, nor that the putative censorship was in diametric opposition to the values that the libraries had publicly and vehemently expressed for approximately seventy years. *ALA*, 539 U.S. at 237 (Souter, J., dissenting).

The analysis is no more complicated here. All of the grant and contract programs subject to the Solomon Amendment help fund the traditional functions of universities[2] and their component law schools. Under the

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[2] Throughout this Brief, the term "universities" will be used for institutions of higher education. Institutions other than universities

rationale in *ALA*, it does not matter, constitutionally, that the law schools find the recruiting requirement onerous. It does not matter that the law schools consider the military's homosexual conduct policy to be discriminatory. It does not matter that this policy is in conflict with the Association of American Law Schools' very public anti-discrimination policy that it promulgated in 1990. *See FAIR*, 291 F. Supp. 2d at 280-82.

Much like libraries, universities "pursue the worthy missions of facilitating learning and cultural enrichment." *ALA*, 539 U.S. at 202. Universities served and continue to serve several other purposes including research, socialization, and job placement. *See* James Mulhern, *A History of Education* 399-404 (2d ed., 1959); *see generally* Robert Paul Wolff, *The Ideal of the University* (1969), *Higher Education in American Society* (Phillip G. Altbach & Robert O. Berdhal, eds., rev. ed., 1987). Particularly germane to the discussion of the universities' role in connection with the Solomon Amendment is the function of placement.

In medieval times, "universities grew up to prepare men for . . . professions." Mulhern, *A History of Education* at 282. In early America, universities' original purpose was to cultivate professionals. "[T]he need for clergymen . . . prompted the establishment of colleges." Wolff, *supra,* at 9. In 1636, Harvard College was founded "[t]o supply . . . pulpits with learned ministers and the colony with teachers and magistrates." Mulhern, *supra*, at 402. Throughout the years there has been much debate over the purpose that universities *should* serve, but all "camps" have agreed that one main purpose of universities is to provide students with the skills to be employed: "Today there is significant agreement between the business-industrial interests and the educators regarding the values of . . . studies, the sciences

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that are institutions of higher education, such as colleges, are meant to be included in this term.

and technology in the education of *leaders for business, industry, the professions, and public service at home and abroad*." *Id.* at 614 (emphasis added). It is a generally accepted principle that an historical and modern function of universities is to provide students with an education that places them in certain occupations.

The student affairs function of universities can be traced to colonial days and the emphasis on career guidance began in earnest after World War I. G. Gary Grace, *Student Affairs and External Relations*, New Directions for Student Services, Winter 2002, 103-10. By the 1970's the placement and career services functions began the transition to their current critical component of America's universities. Gary L. McGrath, *The Emergence of Career Services and Their Important Role in Working with Employers,* New Directions for Student Services, Winter 2002, 69-83. Looking at law schools specifically, "[b]y 1984, every accredited law school in the United States had a placement service." Abbie Willard Thorner, *Legal Education in an Era of Change: Legal Education in the Recruitment Marketplace: Decades of Change*, 1987 Duke L.J., 276, 276 n.1.

All of this presents us with a situation that is exactly analogous to the facts of *ALA*. In *ALA*, this Court noted that because libraries have traditionally excluded pornography from their collections, Congress was permitted to impose the filtering requirement. 539 U.S. at 212. Similarly, here, because universities have traditionally assisted students in obtaining employment, Congress can impose a requirement allowing recruiting for military employment.

In one way, this could be the end of the required analysis under *ALA*. However, the *ALA* Court went further and distinguished the funding conditions in *ALA* from those in *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001). The Court did so in order to explain why the conditions in *ALA* did not constitute an unconstitutional "penalty" and why *Velazquez* did not apply to the facts before it. *ALA*, 539 at 212-13. This additional aspect of the *ALA* Court's analysis

sheds light on the District Court's and Third Circuit's error in holding that the Solomon Amendment impairs the law schools' First Amendment rights under the doctrines of expressive association and compelled speech. It also helps explain why the law schools' viewpoint discrimination claim is flawed. We will look briefly at these additional aspects of the *ALA* opinion.

As noted previously, the Third Circuit, in rubber-stamping the District Court's rejection of the applicability of *ALA* and *Rust*, claimed that the Solomon Amendment imposes a penalty. The irony is that *ALA* itself explains why this is not so. In *ALA*, this Court noted that refusing to fund the Internet activities of recipient libraries that refused to accept the filtering requirements was not a penalty. 539 U.S. at 212. While the idea that attaching such strings is tantamount to creating a penalty may superficially appeal to common sense, this is precisely the view that the *ALA* Court rejected. The Court noted that the filtering requirement

> does not "penalize" libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance.

Id.

Similarly here, the Solomon Amendment does not penalize universities that choose to refuse access to military recruiters or deny them the right to speak out against the military's homosexual conduct policy. Rather, the Solomon Amendment simply reflects Congress' decision not to subsidize their doing so. To the extent that universities wish to engage in their traditional educational functions including research and placement without permitting military recruiters

on campus, they are free to do so without federal assistance.

Finally, the *ALA* Court explained why *Velazquez* did not apply to the facts before it. The Court pointed out that "Velazquez held only that viewpoint-based restrictions are improper when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead funds to encourage a diversity of views from private speakers*." 539 U.S. at 213 (internal quotations omitted; alteration and emphasis original). This Court then noted that forum analysis was entirely inappropriate because the libraries had not installed Internet terminals "to provide a forum for Web publishers to express themselves, but rather to provide patrons with online material of requisite and appropriate quality." *Id.* The distinction is important. Certainly, Web publishers "speak" or engage in expressive activities. And certainly libraries know that when they install Internet terminals. However, it does not logically follow that the libraries' purpose was to open a forum for those publishers.

For similar reasons, the law schools' concerns about viewpoint discrimination and the District Court's analysis of those concerns are completely out of place. (Although the Third Circuit did not even address the viewpoint discrimination claim, it is important to note why the claim is unfounded.)

Universities do not engage in placement services, including opening their campuses to recruiters, to provide a forum for those recruiters. This is true despite the fact that those recruiters "speak." Nor do universities offer placement services as a vehicle for their own speech despite the fact that they may "speak" in the process. As noted above, placement services are part and parcel of the student affairs functions of universities and have their historical roots in America's colonial era. The purpose of placement services is to assist students in a similar manner as do housing services, food services, and other student affairs functions. G. Gary Grace, *Student Affairs and External Relations*, New Directions for Student Services, Winter 2002, 103-10. *Velazquez'*

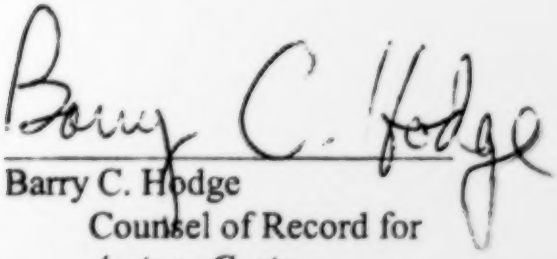
viewpoint discrimination concerns are as out of place here as they were in *ALA*.

For the reasons just stated, *i.e.*, that forum analysis, and, therefore, viewpoint discrimination concerns are out of place in this case, the law schools' viewpoint discrimination claim must also fail. Although the law schools break this claim down into several sub-arguments and although the District Court analyzed each, *FAIR*, 291 F. Supp. 2d at 314-17, it need not have done so. Under a proper unconstitutional conditions analysis, the District Court would have recognized, as discussed above, that viewpoint concerns are simply not germane to the instant case.

CONCLUSION

For the foregoing reasons regarding the unconstitutional conditions and viewpoint discrimination claims and for other reasons stated by the Petitioners, this Court should reverse the Third Circuit's decision.

Respectfully submitted
this 16th day of July, 2005



Barry C. Hodge
Counsel of Record for
Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133

(29)

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Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION, LAW STUDENT ASSOCIATIONS, STATE BAR ASSOCIATIONS, AND THE NATIONAL GAY AND LESBIAN TASK FORCE IN SUPPORT OF RESPONDENTS

[A Full Listing Of The *Amici* On Inside Cover]

JONATHAN L. HAFETZ
Counsel of Record
LAWRENCE S. LUSTBERG
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Pennsylvania Plaza, 37th Fl.
New York, NY 10119
(212) 649-4700

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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INTEREST OF *AMICI CURIAE*[1]

Amici are law student associations,[2] national and state bar associations, and advocacy groups. *Amici* are committed to eliminating discrimination on the basis of sexual orientation at law schools, in the legal profession, and in society at large. They each engage in numerous activities to raise public awareness about discrimination against lesbian, gay, bisexual, and transgender ("LGBT") people and to promote support for nondiscrimination laws and policies throughout the country. The First Amendment right of freedom of association is vital to *amici*'s effort to reach a national consensus in support of the principle of nondiscrimination and equal opportunity for all people regardless of sexual orientation.

Virtually every law school in the country has nondiscrimination policies that explicitly include sexual orientation. Those policies express values that are central to the mission of the schools and the welfare of their students and provide a vision of the kind of society in which *amici* want to learn, work, and live. At stake here is the First Amendment right of law schools to enforce those policies against the military, the nation's largest and arguably most influential employer, whose discriminatory policies clash directly with those of the law schools. *Amici* submit this brief to explain why the Solomon Amendment

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, or their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] These associations appear only on behalf of their respective members, and they may not reflect the position of the law schools or universities with which they are affiliated.

infringes on the law schools' freedom of association and critically and impermissibly undermines the message those schools are conveying to their students and to the world outside their campuses.

SUMMARY OF ARGUMENT

Virtually every law school in the country refuses to assist any employer that discriminates on the basis of sexual orientation. The Solomon Amendment threatens those schools and their respective universities with the loss of potentially millions of dollars in federal funds for enforcing their nondiscrimination policies against the military. The government incorrectly argues that the Solomon Amendment does not implicate the law schools' First Amendment right of association. The law schools adopted and enforce their nondiscrimination policies to teach their ideals of justice to their students and to express their view that discrimination, including discrimination on the basis of sexual orientation, is fundamentally incompatible with the values of the legal profession. The Solomon Amendment significantly interferes with the schools' ability to express that message and, therefore, infringes on their associational rights. Further, it undermines a basic purpose of the freedom of association, which is to prevent the government from using its power to harass opposing groups to encourage conformity with its values.

The law schools' associational interest in adopting and enforcing their nondiscrimination policies is of tremendous value to them. Sexual orientation discrimination remains a significant problem in the legal profession. Law schools' nondiscrimination policies serve three expressive functions

whose importance this continued discrimination underscores: *first*, teaching the values that these law schools believe are essential to the improvement of the legal profession and society; *second*, creating an environment on law school campuses where all students feel equally welcome and able to participate in a meaningful way in the intellectual, social, and cultural life of the school; and *third*, taking a stand in the vigorous national debate on one of the most pressing social issues of the day by rising up in support of and providing an example of equal opportunity regardless of sexual orientation.

The attempt by law schools to maintain their nondiscrimination policies in the face of coercive measures like the Solomon Amendment is an important part of the national struggle against sexual orientation discrimination. The recent surge in state and local nondiscrimination laws illustrates the vigorous nature of the debate over sexual orientation in the United States right now, and makes the decision by law schools to weigh in on that debate a very significant one. Moreover, the military is not just another employer, as the government suggests, but is the nation's largest employer and has tremendous influence on American society. The law schools' attempt to express their message through the even-handed enforcement of their nondiscrimination policies against the military illustrates the importance of the First Amendment right of association and the protections it provides against attempts by the government to compel conformity with its values.

I. THE SOLOMON AMENDMENT INFRINGES ON LAW SCHOOLS' RIGHT OF FREEDOM OF ASSOCIATION.

Nearly every law school in the United States has adopted policies that deny employers access to their career service facilities unless those employers certify that they do not discriminate on the basis of sexual orientation. It is the considered judgment of these schools that it is extremely important to inculcate in their students the principle of nondiscrimination; to maintain an environment in which all students feel that they have equal opportunities to learn, prepare for, and join the legal profession; and to make their voices heard in the broader movement against discrimination in the legal profession and in society at large. The Solomon Amendment, however, threatens those law schools and their universities with the loss of federal funds for applying their nondiscrimination policies to the military, which openly discriminates on the basis of sexual orientation. *See* 10 U.S.C. § 654(b). Moreover, in its current form, the Solomon Amendment demands not merely access to law school campuses and students, but access "that is *at least equal* in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1) (emphasis added). As a result, law schools must provide the military with a range of affirmative assistance, including disseminating the military's recruiting brochures, making appointments with students, and reserving spots for the military in their otherwise private forums for the exchange of information, or lose potentially millions of dollars of funding needed for important university endeavors like medical research.

The government's claim that the Solomon Amendment only regulates conduct and, therefore, "does not implicate the First Amendment right to associate," Brief for the Petitioners at 23, fundamentally misconstrues the freedom of association and the purpose that right serves. Control over membership is not the end of freedom of association, but merely a means of enabling associations to effectively express their respective points of view. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). "Government actions that . . . unconstitutionally burden this freedom may take many forms." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). Interference with an association's internal composition is one such form, but certainly not the only one. *Id.* As history demonstrates – and as *amici* are well aware from their own experiences – the state may infringe on an association's freedom in a variety of other ways. *See, e.g., NAACP v. Button*, 371 U.S. 415, 437-38 (1963) (engaging in litigation); *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 720-26 (1996) (choosing political alliances); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (citing cases). Here, the law schools' freedom of association has been infringed to no less degree simply because the government has tampered with their nondiscrimination policies rather than their membership

Law schools seek to develop future lawyers who "can profoundly change our society, its mores and values," Joint Appendix ("J.A.") 54, and who will seek to further their visions of justice in society, J.A. 228, 230. Almost every law school in the country has adopted nondiscrimination policies to teach its ideals of justice, to create an environment that is inclusive and conducive to learning for all students, and to weigh in on the side of nondiscrimination

in the broader struggle for equal opportunity in the legal profession and society in general. *See infra* at 22-24. The law schools communicate their nondiscrimination policies through a series of activities connected to recruiting, from distributing, posting, and printing literature to making introductions and sponsoring forums for the exchange of information. Those policies express a message that is very important not only to the law schools but also to *amici*, and they fall squarely "within [the] ambit" of expression protected by the First Amendment. *Dale*, 530 U.S. at 648. The Solomon Amendment directly interferes with these core associational activities by enabling the military to insert itself directly into the lives of the law schools, directing the schools' recruiting activities in a critical respect, and requiring the schools to affirmatively assist the military in promoting its discriminatory message. This interference plainly infringes on the law schools' right to freedom of association.

The government also asserts that the law schools are not being forced to communicate a message contrary to their beliefs. Brief for the Petitioners at 20-22. But the critical issue is not, as the government maintains, whether students or other employers will perceive the law schools as endorsing the military's discriminatory policies; rather, it is whether the schools' forced association with the military conflicts with their basic values and ideals. *Dale*, 530 U.S. at 655; *Roberts*, 468 U.S. at 622. The law schools' policies express their view that discrimination on the basis of sexual orientation is morally wrong and fundamentally incompatible with the principles of the legal profession. Those policies teach students that it is wrong to discriminate and equally wrong to enable those who discriminate

to continue doing so. Yet, the Solomon Amendment requires the law schools to assist the military, an employer that openly discriminates on the basis of sexual orientation. The Amendment thus directly conflicts with the law schools' basic values and ideals, and squarely implicates their right to freedom of association.

Moreover, as *amici* law student associations well know, students will in fact perceive their schools as endorsing the military's discriminatory policies, particularly if schools provide the type of affirmative assistance demanded under the Solomon Amendment. Law schools not only prepare students for the legal profession but also help them secure legal employment. In adopting and enforcing their nondiscrimination policies against all employers, law schools communicate their commitment to their students and their belief about their students' place in the legal profession. But the message that law students receive when their schools distribute the military's recruiting brochures and post its bulletins on their campuses is that the schools are not committed to the principle of nondiscrimination in practice and that lesbian, gay, and bisexual students are expendable and unequal members of the law school community. Brief for the Respondents at 14. This has a chilling effect on discourse and learning in law schools, making some LGBT students feel like second-class citizens and discouraging them from speaking out. *Id.* As the record shows, *see, e.g.*, J.A. 17, and as *amici* can further attest, when law schools affirmatively assist the military with its recruiting they send a potent – and demoralizing – message to law students, particularly LGBT students, about the schools' values. This critically undermines the law schools' ability to convey their belief

in equal opportunity to their students and to create an inclusive community on their campuses.

The government further contends that because a function of law schools is "to expose students to a wide range of views," the Solomon Amendment "does not force [the schools] to take a position on an issue that is inconsistent with [their] beliefs." Brief for the Petitioners at 20. But it is for the law schools, not the government, to determine what values they are trying to express and whether the Solomon Amendment impairs that expression. *See Dale*, 530 U.S. at 653 (deferring to "an association's assertions regarding the nature of its expression" and to "an association's view of what would impair [that] expression"); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995) (right of private speakers to shape content of their message). Law schools may expose students to diverse views *and* take an unequivocal institutional stand on issues that they consider important to the welfare of their students, the legal profession, and society at large. Nearly every law school in the country has determined that discrimination on the basis of sexual orientation is wrong and that assisting those who discriminate undermines their ability to teach this message to their students. That determination is entitled to deference. *See Dale*, 530 U.S. at 651 ("[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent.").

Indeed, this case presents a much greater infringement on associational rights than did *Dale*. In *Dale*, the Boy Scouts' mission statement did not even mention sexual orientation, and merely called for scouts to be "morally

straight" and "clean." 530 U.S. at 649-50. Yet, the Court concluded that the Boy Scouts had a First Amendment right to exclude a scoutmaster who happened to be gay based merely on the effect his "presence" would have on the organization's ability to express its message. *Id.* at 653. Additionally, in *Hurley*, the organizers of a Saint Patrick's Day Parade had no written criteria for admission, 515 U.S. at 562, had no "particularized message," *id.* at 569 (citation omitted), and expressed their views through a public celebration full of people in costumes and marching bands rather than through any declarative statement of deep-seated moral values, *id.* at 568-70. Yet, the Court found that the parade had an expressive purpose and that requiring its organizers to admit a contingent expressing a message not of the organizers' choosing violated the First Amendment. *Id.* at 566, 568-70.

Here, the law schools have adopted written policies expressly prohibiting discrimination based on sexual orientation. Their message could not be clearer. As a typical nondiscrimination policy reads: "[The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school *shall not* be available to those employers that discriminate on the grounds of . . . sexual orientation. . . ." J.A. 33-34 (emphasis added and citation omitted). If the unambiguous and unparticularized messages implicated in *Dale* and *Hurley* held expressive value, then so too must the clear commitment to nondiscrimination enumerated in the policies of nearly every law school in the country. It would be very troubling indeed, *amici* submit, if some organizations were free to discriminate based on sexual orientation while other institutions that express a

message of nondiscrimination were forced to assist those who openly discriminate on that basis.

Only by giving short-shrift to the freedom of association can the government ignore the important role this First Amendment right plays in preserving the robust debate over norms and values that is vital to democracy. Freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). An association provides "the medium through which its individual members seek to make more effective the expression of their own views," *NAACP v. Alabama*, 357 U.S. at 459, and thereby enhances "effective advocacy of both public and private points of view, particularly controversial ones," *id.* at 460. Freedom of association also "makes an independent contribution to the First Amendment's project of encouraging robust debate about political issues and so has First Amendment protections apart from those of its members." William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2338 (2002). Indeed, in this country, a robust associational life has traditionally protected against government oppression, 1 Alexis de Tocqueville, *Democracy in America* 194-95 (Renaissance ed., Colonial Press 1900) (1835); Laurence H. Tribe, *American Constitutional Law* 1313 (2d ed. 1988), and served as an inculcator of democratic values, 2 de Tocqueville, *supra*, at 117. Like the freedom of assembly, the freedom of association is critical "in order to maintain the opportunity for free political discussion, to the end that the government may be responsive to the will of the people and that changes, if desired, may be obtained." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

Associations must therefore be protected from government measures that seek to suppress public discussion or compel conformity with the government's values. *See, e.g.*, *Dale*, 530 U.S. at 647-48 ("[Freedom of association] is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."); *Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."). During the African-American civil rights movement, for example, state and local governments in the South sought to undermine the advocacy of the NAACP. The governments in that region of the country disagreed with the values that the association espoused – racial equality and integration – and tried to curtail the association's activities and the larger public dialogue it had helped to spark. There, the harassment commonly took the form of forced disclosure of the NAACP's membership lists, which subjected the association's members to reprisals and undermined its ability to pursue its goals. In fact, compulsory disclosure caused membership to decline throughout the South and threatened the NAACP's very survival in places. *See* Mark Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1931-1961*, at 290-91 (1994). This Court properly rejected the Southern states' attempts, recognizing the dangers that government suppression of freedom of association poses to a democratic society. *See, e.g.*, *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539, 558 (1963) (invalidating contempt judgment issued by state's investigating legislative committee); *NAACP v. Alabama*, 357 U.S. at 466 (invalidating state

court contempt order for association's refusal to disclose membership lists).

Cases involving attempts to prohibit membership in or association with the Communist Party during the Cold War teach a similar lesson. The Court did not challenge Congress's findings that the Party was engaged in illegal activity, including terrorism and espionage, with the goal of overthrowing the United States by force and violence; nor did the Court ever question that protecting the nation against such threats was a compelling interest. David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 Sup. Ct. Rev. 203, 218 (1999). Nevertheless, the Court consistently rejected attempts to penalize or chill lawful First Amendment activity, condemning a variety of anti-Communist measures which penalized mere association. *See, e.g., United States v. Robel*, 389 U.S. 258, 262 (1967) (invalidating ban on Communist Party members working in defense facilities); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) (invalidating statute barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (invalidating oath requiring state employees not to join Communist Party); *Scales v. United States*, 367 U.S. 203, 221-22 (1961) (construing Smith Act, which barred membership in organization advocating violent overthrow of government, to require showing of "specific intent" to further group's illegal ends). The Court recognized the "real danger" to freedom of expression in prohibiting all association with the Communist Party when some of the Party's aims were not illegal but simply unpopular or controversial. *Scales*, 367 U.S. at 229; *see also Elfbrandt*, 384 U.S. at 16-17; *Brown v. Socialist Workers '74 Campaign Committee*, 459

U.S. 87, 101-02 (1982) (prohibiting application of campaign finance disclosure provision to minor political party where it could subject party's members to threats or reprisals). In a climate of intense debate, measures curtailing freedom of association, even in pursuit of legitimate and compelling ends like national security, can "stifl[e]" public discussion. *Keyishian*, 385 U.S. at 607. The Court thus construed anti-communist provisions narrowly to preserve associational freedom, *Scales*, 367 U.S. at 229, and prevented the state from "cast[ing] its net across a broad range of associational activities," *Robel*, 389 U.S. at 265-66.

The subjects of public debate change over time, and the tactics used by governments to compel conformity with their values take a variety of forms. Most recently, controversies have involved issues surrounding discrimination based on gender or sexual orientation. *See, e.g.*, *Dale*, 530 U.S. at 643-44 (excluding gay man from membership in Boy Scouts); *Hurley*, 515 U.S. at 561, 570 (preventing gay, lesbian, and bisexual organization from marching in Saint Patrick's Day parade); *Roberts*, 468 U.S. at 612 (barring women from full membership in local civic organization). The Court has emphasized that the First Amendment prevents the state from dictating or influencing the outcome of these controversies by restricting an association's expression of its values or beliefs. *See, e.g.*, *Dale*, 530 U.S. at 647-48; *Roberts*, 468 U.S. at 622;[3] *see also Hurley*, 515

[3] In *Roberts*, the Court upheld a state public accommodations law forbidding discrimination on the basis of sex against a First Amendment challenge by the United States Jaycees, which had refused to admit women. 468 U.S. at 612. There, however, the membership integration did not go to the core expressive purpose of the Jaycees or materially affect the group's ability to express its ideas, and, hence, the

(Continued on following page)

U.S. at 575 (choice of speaker to propound or not to propound a given point of view "is presumed to lie beyond the government's power to control").

Here, law schools took a stand on one of the most hotly-contested issues in society today. The Solomon Amendment then sought to "send a message over the wall of the ivory tower of higher education" that these schools' "starry-eyed idealism comes with a price." 140 Cong. Rec. 11,441 (1994) (Rep. Pombo). When law schools refused to buckle under the pressure, and in order to compel compliance, the law was amended to make that price more painful. *See* Brief for the Respondents at 11 (describing the escalating sanctions). The Solomon Amendment now threatens law schools and their universities with the loss of millions of dollars in federal funds if they do not give military recruiters exactly the same access to their students and campuses as nondiscriminating employers enjoy. That is impermissible. The First Amendment ensures that in a democracy the government cannot settle

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right of association was weak. *Id.* at 626 (noting Jaycees failed to demonstrate "any serious burdens on the male members' freedom of expressive association"). The same was true in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), which also involved the exclusion of women from a private club. *See* 481 U.S. at 548; *see also Dale*, 530 U.S. at 657 (enforcement of public accommodations statutes "would not materially interfere with the ideas that the organization[s] sought to express" in *Roberts* and *Duarte*). In addition, whatever infringement was accomplished in *Roberts* and *Duarte* was justified by the state's constitutionally recognized interest in combating sex discrimination. *See, e.g., Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728-30 (2003).

public debate by bullying its opponents, regardless of what side of the political spectrum those opponents are on.

The government argues that it is not restricting speech or freedom of association because law schools can criticize the Solomon Amendment or at least offer disclaimers about why they are helping the military to violate their own nondiscrimination policies. The evidence shows that this is false, and that the Solomon Amendment undermines the law schools' ability to express their message. *See* Brief for the Respondents at 14. But, even were that not so, an association must remain free to express its message of protest in the manner it chooses and, accordingly, is not limited to public pronouncements if the association feels that those pronouncements will not effectively convey its message. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (protecting right of civil rights group to protest against discrimination by boycotting businesses that discriminate).

The Solomon Amendment, moreover, appears to permit suppression even of the kind of expressive activity that the government claims the Amendment preserves. As written, the Solomon Amendment mandates that law schools provide access to their campuses and students that is equal "in *quality* and scope" to that provided to other employers. 10 U.S.C. § 983(b)(1) (emphasis added). What if law student organizations, such as *amici*, engaged in a demonstration which the military believed hindered its access to a law school campus or to law school students, or made that access in any way inferior "in quality" to the access enjoyed by nondiscriminating employers? Under the Solomon Amendment, the government could threaten to withdraw millions of dollars in federal funds from the university unless the law school cracked down on the

students and did so successfully. This scenario is not far-fetched. In arguing for the present equal access provision, a Department of Defense official cited a law school's failure to stifle student protest as a "particularly egregious" example of denying the military access to students. H.R. Rep. No. 108-443, pt. 1, at 7; *see also id.* (complaining that "military recruiters and prospective recruits have been forced to endure verbal abuse and harassment"). Indeed, there is no limit to the range of associational activities that could be restricted in the name of "*uninhibited* recruitment programs." *Id.* at 4 (conclusion of Armed Service Committee report on 2004 amendments to Solomon Amendment) (emphasis added).

In short, the First Amendment protects a broad range of expressive activities by associations. This Court has given meaning to this protection by making clear that associations are in the best position to determine the content of their expression and the type of government restrictions that would impair it. The right of freedom of association is equally robust regardless of whether groups are "progressive" or "conservative," or whether the government disagrees with their message. Indeed, coercive measures like the Solomon Amendment represent precisely the kind of attempt to compel conformity with the government's values that the freedom of association guards against. It is essential, then, that the law schools remain free to express their ideals through the even-handed enforcement of their nondiscrimination policies.

II. ONGOING DISCRIMINATION IN THE LEGAL PROFESSION DEMONSTRATES THE VALUE OF THE LAW SCHOOLS' ASSOCIATIONAL INTEREST IN THEIR NONDISCRIMINATION POLICIES.

Law schools historically have resisted discrimination based on characteristics unrelated to merit, and have considered that resistance part of their educational mission. In 1950, for example, the Association of American Law Schools adopted a policy opposing segregation or discrimination in legal education on racial grounds, declaring that "it was the professional duty of all member schools to abolish any such practices at the earliest practicable time." Michael H. Cardozo, *Racial Discrimination in Legal Education, 1950 to 1963*, 43 J. Legal Educ. 79, 79 (1993) (citation and internal quotation marks omitted). Since then, law schools have continued to adopt policies opposing and prohibiting discrimination on other grounds. Brief of *Amicus Curiae* Association of American Law Schools in Support of Appellants, at 5, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (inclusion of gender). The law schools' inclusion of sexual orientation in their nondiscrimination policies thus reflects their longstanding commitment to the principle of equal opportunity for all people.

The law schools' associational interest in adopting and enforcing their nondiscrimination policies has tremendous value to them. Contrary to the assertion by members of Congress that law schools are engaging in ivory tower elitism, *see, e.g.*, 141 Cong. Rec. H5963 (1995) (Rep. Solomon), sexual orientation discrimination remains a real problem in the legal profession. Law schools' nondiscrimination policies serve several important purposes: *first*, teaching the values these law schools believe are essential

to the improvement of the legal profession and society; *second*, creating an environment on law school campuses where all students feel equally welcome and able to participate in a meaningful way in the intellectual, social, and cultural life of the school; and *third*, taking a stand in the vigorous national debate on one of the most pressing social issues of the day by rising up in support of and providing an example of equal opportunity for all people regardless of sexual orientation. The schools' nondiscrimination policies, which accomplish each of these ends, clearly constitute expressive activity and are entitled to First Amendment protection.

Discrimination on the basis of sexual orientation has a long history in the legal profession. Until the mid-1980s, for example, gays and lesbians faced exclusion from the bar on the basis of sexual orientation when bar associations would use the screenings of applicants for moral character to discourage gays and lesbians from entering the legal profession. William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 Hastings L.J. 1101, 1110 (1997). Also, because legal environments were often oppressive or even dangerous places to form LGBT law student, bar, and civil rights groups, these groups did not begin to flourish on campuses until the 1970s. *Id.* at 1109-10.

While the number of people openly supporting discrimination based on sexual orientation has decreased over the past three decades, anti-gay bias remains a significant problem throughout the country. Numerous studies of the legal profession in particular have found significant, if not pervasive, instances of discriminatory conduct towards and attitudes about gays and lesbians. These studies demonstrate that LGBT law students

continue to struggle in deciding whether and how to be open about their sexual orientation in searching for jobs, that entire job categories remain unavailable to openly LGBT attorneys, and that LGBT attorneys still regularly confront discriminatory treatment throughout the legal profession. *See generally* Rubenstein, *In Communities Begin Responsibilities*, *supra*, at 1115-16.

A Los Angeles report, for example, indicates that the number of lawyers affected by anti-gay bias "is substantial." The Los Angeles County B. Ass'n Rep. on Sexual Orientation Bias (1995) ("Los Angeles Report"), *reprinted in* 4 S. Cal. Rev. L. & Women's Stud. 305, 305-06 (1995). This discrimination is "widespread and manifests itself in all stages and aspects of attorney employment," including "recruitment and hiring; general work environments; work assignments; evaluation; promotion and advancement; compensation; and retention and career path." *Id.* at 310-11. The report found that over 38 percent of heterosexual attorneys, almost 68 percent of lesbian attorneys, and over 58 percent of gay male attorneys either witnessed or experienced anti-gay discrimination. *Id.* at 310-11.

An Arizona report concluded that discriminatory conduct takes place in courtrooms, large firms, and law schools, and that "lesbians and gay men are at a substantial disadvantage in all areas of contact with the justice system in [the State]." Final Report of State Bar of Arizona Task Force on Gay and Lesbian Issues, ("Arizona Report"), 37 AZ Att'y 36, 37 (2000). It found that "[t]he percentage of discriminatory incidents observed by gay men and lesbians who work inside our legal system is double that observed" by members of the general public, and that "the more contact a gay man or lesbian has with the justice system, the more likely he or she is to observe incidents of

discriminatory conduct." *Id.* at 38. Similarly, a District of Columbia survey reported that over one in four LGBT attorneys had witnessed or heard of a client, supervising lawyer, junior attorney, or non-lawyer staffer who declined to work with a lawyer because the lawyer was gay or thought to be gay. D.C. B. Sexual Orientation Task Force Rep., at Lawyer Survey Table 21 (2000) ("D.C. Report"), *available at* http://www.dcbar.org/inside_the_bar/structure/reports/task_force/index.cfm.

Such discrimination significantly affects the lives of gay and lesbian lawyers. LGBT attorneys continue to be denied employment and health insurance benefits for their partners, and often are not provided with family leave to care for a sick domestic partner or child of a domestic partner, or to provide care when a partner adopts or gives birth to a child. D.C. Report, *supra*, Lawyer Survey Table 17; Employer Survey Table H. They are also far less likely to become partners than heterosexual attorneys and are subjected to less favorable advancement criteria. Los Angeles Report, *supra*, at 322.

Anti-gay discrimination also places LGBT workers in the uncomfortable position of having to choose between being open about their sexual orientation – and risking discriminatory treatment or attitudes – or hiding their identity to advance and succeed within their respective organizations. *See, e.g.*, William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA Women's L.J. 379, 393-94 (1998) (describing fear among gay and lesbian attorneys of being open about their sexuality in the same manner as heterosexual attorneys). For example, almost half of the LGBT respondents to a District of Columbia survey concealed their sexual orientation, and over 50

percent thought that it would be detrimental to be open about their sexual orientation in the legal workplace. D.C. Report, *supra*, Lawyer Survey Table 9, available at http://www.dcbar.org/inside_the_bar/structure/reports/task_force/index.cfm; *see also* Los Angeles Report, *supra*, at 312 (noting that many gay attorneys choose to conceal their sexual orientation because of "overt hostility and blatant discrimination"). Indeed, hiding in the closet[4] is often considered "the most certain and, in some instances, the only path to job security." Los Angeles Report, *supra*, at 337.

Consequently, LGBT attorneys often refrain from discussing their private lives in the same manner as is acceptable for the non-homosexual majority. *See generally* D.C. Report, *supra*, Section II.C.1, *available at* http://www.dcbar.org/inside_the_bar/structure/reports/task_force/II_C_1.cfm. As a practical matter, many LGBT attorneys are thus unable to display family photographs, take leave for a sick partner, discuss their loved ones openly, or even reveal the neighborhood they live in – things most heterosexual attorneys take for granted. Instead, LGBT attorneys often feel invisible. They are presumed to be heterosexual, and then are put in the position of revealing their sexual orientation as a consequence of mentioning details of their everyday lives. *Id.*, Section II.C.4, *available at* http://www.dcbar.org/inside_the_bar/structure/reports/task_force/II_C_4.cfm. At the same time, by remaining closeted, not bringing partners to events, and not discussing their private lives, LGBT attorneys can be perceived as aloof and distant, and, as a result, are less likely to be promoted. E.J. Graff, *Welcoming the Invisible Bar: Lesbian and Gay Attorneys,*

[4] "Hiding in the closet" is a colloquial phrase for concealing one's sexual orientation.

Diversity and the Bar (June 2002), *available at* http://www.mccacom/site/data/magazine/coverstory/invisiblebar0602.shtml.

The fact that many heterosexual attorneys are unaware of anti-gay bias further underscores why law schools have concluded that it is so important to raise awareness about and address anti-LGBT discrimination in the legal profession. For example, one report found that approximately 25 percent of heterosexual attorneys surveyed said they did not know of any LGBT attorneys in their workplace, as compared to 7 percent of lesbian and gay respondents. D.C. Report, *supra*, Lawyer Survey Table 11, *available at* http://www.dcbar.org/inside_the_bar/structure/reports/task_force/index.cfm. And, while 75 percent of heterosexual respondents to that study did not believe that being openly gay would harm an attorney's career, over 50 percent of gay or lesbian respondents thought it would. *Id.*, Lawyer Survey Table 9, 15.

The evidence of continued discrimination in the legal profession underscores why law schools' nondiscrimination policies are a valuable expressive activity to those schools. Law schools have at least three distinct interests in enforcing their nondiscrimination policies in an even-handed way, all heavily imbued with expression. *First*, in addition to teaching skills, law schools also teach students about their ideals of justice and seek to instill in them the values they believe every member of the legal profession should have. The overriding message of this lesson is that it is wrong to discriminate and equally wrong to assist those who do so. It is the law schools' considered judgment that adopting and enforcing nondiscrimination policies is the best way to communicate that lesson to their students. What message, then, does a law school send to those students when it provides its full assistance, services, and

resources to an employer that expressly discriminates based on arbitrary criteria, like sexual orientation, which bear no relationship to merit? Imagine the message it would send to a law school's African-American students if the school distributed brochures and made appointments for an employer that openly discriminated on the basis of race. As every student knows, a teacher, more than anyone else, must practice what he preaches to be taken seriously. When a law school fails to enforce its nondiscrimination policies even-handedly, the school's message is diminished and distorted, breeding disrespect for the school and contempt for the very lesson it wants to teach.

Second, law schools seek to create an inclusive environment on their campuses in which all students feel equally welcome and able to participate in the intellectual, social, and cultural life of the school. That goal is expressed through a school's nondiscrimination policies. The evidence of discrimination described above underscores why law schools felt the need to include sexual orientation in their policies: law schools recognize that when a student feels like a second-class citizen it prevents him or her from having a meaningful educational experience, especially when the student believes the discrimination results from race, gender, religion, national origin, or sexual orientation – none of which has anything to do with the student's inherent ability to succeed at law school and in the legal profession. But that is precisely what happens to LGBT students when law schools fail to apply their stated nondiscrimination policies to an employer that openly discriminates based on sexual orientation.

Third, by adopting and enforcing nondiscrimination policies, law schools express their ideals and values not only on their own campuses but in society at large. Through

their nondiscrimination policies, law schools have taken a stand in the debate over sexual orientation discrimination that is occurring at kitchen tables and in voting booths in towns and cities across America. Those policies, then, are not ivory tower elitism or academic "nonsense," as some members of Congress have asserted, *see, e.g.*, 141 Cong. Rec. H5963 (1995) (Rep. Solomon), but, rather, a way for law schools to make their voices heard in one of the most important civil rights battles of this generation. This expressive activity is protected by the First Amendment.

III. THE RAPID SURGE IN NONDISCRIMINATION LAWS AND THE MILITARY'S INFLUENCE ON AMERICAN SOCIETY UNDERSCORE THE SIGNIFICANCE OF LAW SCHOOLS' CONSTITUTIONALLY PROTECTED DECISION TO TAKE A STAND IN THE ONGOING DEBATE OVER SEXUAL ORIENTATION DISCRIMINATION.

The attempt by law schools to maintain their nondiscrimination policies in the face of heavy-handed measures like the Solomon Amendment is an important part of the national struggle against sexual orientation discrimination. Over the past three decades, states, counties, and cities have pioneered the passage of laws mandating equal treatment of LGBT people, and they have done so "at an ever accelerating rate." *See* Kara S. Suffredini, *What a Difference a Decade Makes: Lesbian, Gay, Bisexual and Transgender Nondiscrimination Law and Policy in the United States*, 13 The Diversity Factor (No.1) (2005). Presently, sixteen states and the District of Columbia have laws prohibiting discrimination based on sexual orientation in employment as well as in other areas like housing,

public accommodations, and education.[5] Over half of these laws were passed in the last ten years. *See* "State

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[5] *See* Cal. Gov't Code §§ 12926(m), 12926(q), and Cal. Penal Code § 422.56(h) (definitions); Cal. Gov't Code §§ 12920, 12940 (employment and housing) (Deering 2005); Conn. Gen. Stat. Ann. §§ 46A-81a (definition); 46a-81c (employment); 46a-81d (public accommodations); 46a-81e (housing); 46a-81f (credit) (2004); D.C. Code §§ 2-1401.02(28) (definition); 2-1402.11 (employment); 2-1402.31 (public accommodations); 2-1402.41 (education); 2-1402.71 (motor vehicle insurance) (2005); Haw. Rev. Stat. §§ 368-1 (policy); 378-1 (definition); 378-2 (employment); 515-2, 515-3, 515-5, 515-6, 515-7 (housing) (2004); 775 Ill. Comp. Stat. §§ 5/1-102 (employment, housing, credit, and public accommodations); 5/1-103(O-1) (definition); 5/5-101 (public accommodations definition) (2005); 2005 Me. Legis. Serv. Ch. 10 amendments to 5 Me. Rev. Stat. Ann. tit. 5, §§ 4552 (policy); 4553 (definitions); 4571-72 (employment); 4581-83 (housing); 4591-92 (public accommodations); 4595-98 (credit); 4601-04 (education) (West 2005); Md. Code Ann., art. 49B, §§ 5 (public accommodations); 15(j) (definition); 16 (employment); 20-22 (housing) (2005); Mass. Gen. Laws Ann. ch. 151B §§ 1 (definitions); 3A (employment) (2005); Minn. Stat. §§ 363A.02 (employment, housing, public accommodations, education, public services); 363A.03 (definitions); 363A.08 (labor organizations, employers, employment agencies); 363A.16 (credit) (2004); Nev. Rev. Stat. §§ 281.370 (policy and definitions); 613.330, 613.340 (employment) (2004); N.H. Rev. Stat. Ann. §§ 21:49 (definitions); 354-A:1 (policy); 354-A:2 XIV-a (definitions); 354-A:6 (employment); 354-A:8-10 (housing); 354-A:16-17 (public accommodations) (2004); N.J. Stat. Ann. §§ 10:5-4 (policy); 10:5-5 (definitions); 10:5-12 (employment, public accommodation, housing, credit) (2005); N.M. Stat. Ann. §§ 28-1-2(P) (definition); 28-1-7(A) (employment); 28-1-7(B) (labor organizations); 28-1-7(C) (training programs); 28-1-7(F) (public accommodations); 28-1-7(G) (housing); 28-1-7(H) (credit) (Michie 2005); N.Y. Exec. Law §§ 296(1) (employment), 296(2) (public accommodations), 296(2-a), 296(3-b), 296(5)(a) (housing); 296(4) (education); 296-a (credit) (2005); R.I. Gen. Laws §§ 28-5-2, 28-5-3, 28-5-6(15), 28-5-7 (employment); 34-37-4 (housing); 34-37-4.3 (credit); 11-24-2, 11-24-2.2, 11-24-2.3 (public accommodations) (2005); Vt. Stat. Ann. tit. 21, §§ 495, 495a-h & tit. 3, § 963 (employment); tit. 9, §§ 4501, 4502 (public accommodations); tit. 9, § 4503 (housing); tit. 8, § 10403 (credit); tit. 8, § 4724 (insurance) (2004); Wis. Stat. Ann. §§ 106.50(1), 106.50(1m)(t) (definition); 106.52 (public accommodations); 111.31, 111.32, 230.18 (employment); 224.77(1)(o) (credit) (2005).

Nondiscrimination Laws in the U.S.," *available at* http://www.thetaskforce.org/downloads/nondiscriminationmap.pdf. More than three hundred local governments in 42 states also prohibit discrimination on the basis of sexual orientation by legislative action or executive order. *See* "States, Cities and Counties with Civil Rights Ordinances, Policies or Proclamations Prohibiting Discrimination on the Basis of Sexual Orientation," *available at* http://www.thetaskforce.org/downloads/FAIRAmicus-LocalLawsTable.pdf; *see also* Suffredini, *supra* (discussing growth of state and local laws). In addition, private companies are continuing to adopt nondiscrimination policies that include sexual orientation. For example, over 400 of the Fortune 500 companies now prohibit discrimination on the basis of sexual orientation. *See* The Human Rights Campaign, "Employers with Non-Discrimination Policies that Include Sexual Orientation: Private Sector Companies," *available at* http://www.hrc. org/worklife/ndsosearch (follow "Fortune 500 Companies (414)" hyperlink). It is estimated that a majority of American workers are now employed in jurisdictions where they are protected by law from sexual orientation discrimination, *see* Arthur S. Leonard, *Twenty-First Annual Carl Warns Labour & Employment Institute: Sexual Minority Rights in the Workplace*, 43 Brandeis L.J. 145, 149 (2004-2005), although the other half of the population of the United States – over 156 million people – remains vulnerable to being fired, denied benefits, or subjected to other forms of discrimination on the basis of sexual orientation, Suffredini, *supra*.

The recent surge in nondiscrimination laws illustrates the vigorous nature of the debate over sexual orientation taking place in the United States today. This surge also has a reinforcing effect that is unique to the problems

confronting LGBT individuals in the legal profession and that bears directly on the role associations play in fostering meaningful public debate. Specifically, the more widespread nondiscrimination laws and policies become, the more LGBT people will consider the norm sufficiently widespread to feel comfortable coming out of the closet. However, measures like the Solomon Amendment, which seek to compel conformity with the government's values, undermine this reinforcing effect and, in the process, curtail the robust public dialogue that is necessary for society to reach a genuine consensus on this issue.

In this context, the law schools' stance on sexual orientation discrimination, and how the schools treat the military, which openly engages in such discrimination, is very significant. The military is not just another employer, as the government suggests. Brief for the Petitioners at 21. It is the nation's largest employer, with over two million workers, DoD 101: An Introductory Overview of the Department of Defense, *available at* http://www.defenselink.mil/pubs/dod101/dod101for2002.pdf, including 700,000 civilians in over 700 occupations, Department of Defense Jobweb Overview, *at* http://www.jobweb.com/employer/matrix/dod.htm. Indeed, the military describes itself as the oldest, largest, busiest, and most successful company in the United States, and says it employs more people and has a larger budget and greater revenue than Wal-Mart, ExxonMobil, or Ford. *See* DoD 101: An Introductory Overview of the Department of Defense, *supra*.

The military's employment policies have a powerful influence on the country. For example, the decision by President Truman to integrate the military over a half-century ago not only quickly led to the racial integration of military units, *see* The Truman Administration and the

Desegregation of the Armed Forces: A Chronology, *at* http://www.trumanlibrary.org/deseg1.htm, but also dramatically influenced public attitudes at the time, *see, e.g.*, Michael Barone, *Our Country: The Shaping of America from Roosevelt to Reagan* 272 (1990). The desegregation of the military helped pave the way for the acceptance of the principles of racial integration and racial equality across American society. *See, e.g.*, Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 522 (1991); *see also* Justice Ruth B. Ginsburg, *Remark:* Brown v. Board of Education *Half a Century Later: The Comparative Perspective:* Brown v. Board of Education *in International Context, October 21, 2004*, 36 Colum. Human Rights L. Rev. 493, 493-94 (2004) (describing influence of military's experience with racial integration in setting stage for Court's landmark decision in *Brown v. Board of Education*). The racial integration of the armed forces was intended to send a message which the military felt was very important at the time. Ginsburg, *supra*, at 493 (describing how military recognized importance of integration for America's "prestige, power and future security") (internal quotation marks and citation omitted). By the same token, the military's current message about sexual orientation is one of discrimination and exclusion, not equality and integration, but it is still an influential one, and one which the law schools, through the even-handed application of their nondiscrimination policies, have a right to resist.

Yet, even if the military were just like any other employer, law schools would have the same associational interest in enforcing their nondiscrimination policies against it. Under the Solomon Amendment, law schools face crippling punishment for denying the military access

to their campuses and students even though the military flouts the schools' written policies by discriminating on the basis of sexual orientation. This chills the ability of law schools to clearly and effectively express their message to their students, the legal profession, and society at large.

In sum, law schools are engaging in highly expressive activity that reflects their deepest values and their sense of their mission as educational institutions. The schools' nondiscrimination policies send a message to the law students on their campuses and to the world outside that discriminating on the basis of sexual orientation or assisting those who do so is wrong and should not be tolerated in the legal profession or society generally. Their decision to weigh in on one of the most hotly-contested debates of this generation is not academic nonsense and is critically important to the efforts of *amici* and many others to reach a national consensus in support of the principle of nondiscrimination and equal opportunity for all people regardless of sexual orientation. The government's suggestion that the Solomon Amendment does not implicate the First Amendment right of association is wrong and threatens to strip that right of its fundamental meaning and purpose. *Amici* respectfully submit that law schools have a First Amendment right to enforce their nondiscrimination policies even-handedly and free of government interference that prevents them from expressing their message to students, employers, and the public in an effective and meaningful way.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the decision of the court of appeals.

Respectfully submitted,

JONATHAN L. HAFETZ
Counsel of Record
LAWRENCE S. LUSTBERG
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Pennsylvania Plaza, 37th Fl.
New York, NY 10119
(212) 649-4700

(12)

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In The Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC
AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICI CURIAE BRIEF ON THE MERITS OF U.S. CONGRESSMAN RICHARD POMBO, NEW JERSEY AND PENNSYLVANIA LAW STUDENTS ELIZABETH P. RIZZO, DAVID WASSERMAN, AND DANIEL L. STANTS, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY*
**Counsel of Record*
JOSEPH F. BECKER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the Pombo-Solomon Amendment's equal access condition on federal funding violates the First Amendment to the U.S. Constitution and in directing a preliminary injunction to be issued against its enforcement?

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AMICI CURIAE BRIEF OF CONGRESSMAN RICHARD POMBO, NEW JERSEY AND PENNSYLVANIA LAW STUDENTS ELIZABETH P. RIZZO, DAVID WASSERMAN, AND DANIEL L. STANTS, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amici curiae* brief in support of Donald H. Rumsfeld, *et al.*, Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amici curiae* brief is filed with the written consent of the parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

Congressman Richard W. Pombo was sworn in to his seventh term in the United States House of Representatives in January 2005. He represents the Eleventh Congressional District of the State of California, comprising San Joaquin, Alameda, Contra Costa, and Santa Clara Counties. Congressman Pombo has been active in ensuring that the Reserve Officers' Training Corps ("ROTC") is allowed on college campuses and he set a precedent in steering the passage of the Pombo-Solomon Amendment, the legislation at issue here. Congressman Pombo has been rewarded by several organizations for his activism in

[1] Counsel for Petitioners, Donald H. Rumsfeld, *et al.*, and Respondents, Forum for Academic and Institutional Rights, *et al.*, consented to the filing of this *amici* with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for either party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

reducing government regulations, taxation, and spending, including the United States Business and Industrial Council, National Taxpayers Union, Americans for Tax Reform, and the U.S. Chamber of Commerce.

Elizabeth P. Rizzo is a resident of the State of New Jersey and a full-time law student at Rutgers University School of Law, a public university in New Jersey. Prior to entering law school, Ms. Rizzo was an inflight training instructor for Continental Airlines. She currently is an officer of the Rutgers University School of Law Federalist Society.

David Wasserman is a resident of the State of New Jersey and a full-time law student at Seton Hall University Law School. Prior to entering law school, Mr. Wasserman worked in the office of a New Jersey Senator, Barbara Buono. He is currently a member of the College Democrats and the Jewish Law Students Association.

Daniel L. Stants is a resident of the State of Pennsylvania and a part-time law student at Duquesne University School of Law. Prior to entering law school, Mr. Stants served as a United States Air Force navigator and has more than 1,800 hours of flight time, including combat. He is currently a published member of the Law Review at Duquesne University School of Law.

MSLF is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion, and assembly. For example, MSLF was a party in

Mountain States Legal Foundation v. Colorado, 946 P.2d 586 (Colo. App. 1997), and counsel in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), *cert. den. sub nom. Communities For A Great Northwest v. Vaughey*, 534 U.S. 817 (2001). MSLF believes that its expertise on the guarantees of the U.S. Constitution regarding First Amendment freedoms will assist this Court.

SUMMARY OF ARGUMENT

The Court should reverse the decision of the Third Circuit: (1) to restore the only means by which taxpayers may limit or direct spending through their elected representatives; (2) to protect the rights of Congressional Members to represent properly the fiscal and political interests of their constituents and to legislate on matters of vital public policy; (3) because the lower court erred and, in so doing, denied associational rights of students and potential employers at federally funded state and private schools; and (4) because balancing the rights of Congress to exercise its enumerated power of raising an army and the alleged First Amendment rights of Respondents, the Forum for Academic and Institutional Rights ("FAIR"), *et al.*, tips heavily in favor of Congress.

ARGUMENT

I. THE POLITICAL PROCESS AND THE "POWER OF THE PURSE" IS THE TAXPAYERS' ONLY CHECK ON DELETERIOUS GOVERNMENT SPENDING AND MUST BE PROTECTED BY THIS COURT.

For years, this Court has held that, absent some particularized injury, taxpayers have no standing to raise issues with respect to how their tax dollars are appropriated. "The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this court." *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). "Standing to sue may not be predicated on an interest of the kind which is held in common by all members of the public because of the necessarily abstract nature of injury all citizens share; concrete injury, whether actual or threatened, is that indispensable element of dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974).

Instead, to exercise this political check on deleterious spending, "[m]embers of Congress . . . are chosen to speak for those who elected them." *U.S. Postal Service v. Hustler Magazine, Inc.*, 630 F.Supp. 867, 871 (D.C. Cir. 1986). "As the framers of the Constitution expressly contemplated, a Senator or Congressman should naturally 'take care to inform himself of [his fellow citizens'] dispositions and inclinations . . . '" *Id.* (citing *The Federalist* No. 35, at 221 (J. Cooke ed., 1961)). "It is this dependence on public opinion that helps to forge 'the strong chords of sympathy between the representatives and the constituent.'" *Id.*

"Besides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents." *Williams v. U.S.*, 71 F.3d 502, 507 (5th Cir. 1995).

> [T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive . . . [S]o necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

Gravel v. U.S., 408 U.S. 606, 653-654 (1972) (citing 8 *The Works of Thomas Jefferson*, at 322 (Ford ed., 1904)).

As such, absent this Court upholding the right of taxpayers to allocate spending through their elected members of Congress, taxpayers are left with no constitutional or fiscal check on the government's allocation of the taxpayers' earnings.

II. MEMBERS OF CONGRESS HAVE A RIGHT AND DUTY TO REPRESENT THEIR CONSTITUENTS ON MILITARY AND FISCAL MATTERS AND ARE ENTITLED CONSTITUTIONALLY TO GREAT DEFERENCE FROM THE COURTS ON SUCH MATTERS.

A. The "Power Of The Purse" Rests With Congress.

> This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, at 391 (James Madison) (Benjamin Fletcher Wright ed., 1961).

> Candidates for office engage in heated contests and the victor is he who receives the greatest number of votes from his constituents. These campaigns are run on platforms that include statements of intention and undertakings to promote certain policies.
>
> * * *
>
> These promises are geared, at least in part, to the interests of the Congressman's constituency. Members of Congress may be legally free from dictation by the voters, but there is a residual conviction that they should have due regard for the interests of their States or districts, if only because on election day a Member is answerable for his conduct.
>
> * * *

> Serving constituents is a crucial part of a legislator's ongoing duties. Congressmen receive a constant stream of complaints and requests for help or service. Judged by the volume and content of a Congressman's mail, the right to petition is neither theoretical nor ignored. It has never been thought unethical for a Member of Congress whose performance on the job may determine the success of his next campaign not only to listen to the petitions of interest groups in his State or district, which may come from every conceivable group of people, but also to support or oppose legislation serving or threatening those interests.

U.S. v. Brewster, 408 U.S. 501, 556-557 (1972) (J. White, dissenting).

In representing those constituent interests, "this Court's cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. *See, e.g., Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947); *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970)." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (complete cites omitted).

In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937). Moreover, Congress receives great deference from this Court in conditioning receipt of federal benefits on the recipients' behavior. This is especially true when the conditions required serve to accomplish one of Congress' enumerated powers (such as raising a military). *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987).

The Founding Fathers empowered Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. at 206-207 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (Burger, C.J.). *See also*, *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Service Comm'n*, 330 U.S. at 143-144; *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)).

The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936), wherein the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." "Thus, objectives not thought to be within Article I's 'enumerated legislative fields,' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. at 207.

B. On Military Matters, Congress Is Entitled To Maximum Deference.

Moreover, this case does not merely involve the customary deference accorded congressional decisions.

Instead, it arises "in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). This Court has recognized consistently Congress' "broad constitutional power" to raise and regulate armies and navies. *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975). Congress has the power "To raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981). In considering a challenge to the selective service laws, this Court noted that, "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See Lichter v. United States*, 334 U.S. 742, 755 (1948).

Not only is the scope of Congress' constitutional power in this area broad, the lack of competence on the part of the courts is marked. In *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), this Court noted:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.[2]

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[2] *See also Orloff v. Willoughby*, 345 U.S. 83, 93-94 n.5 (1953); *Rostker*, 453 U.S. at 64-66.

"It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view." *Chappell v. Wallace*, 462 U.S. at 300-301. The right of Congressman Pombo and other members of Congress to represent the political will of their constituents and so legislate regarding military matters must be retained and the decision of the Third Circuit should be overturned.

III. THE THIRD CIRCUIT ERRED ON THE LAW AND, IN SO DOING, DENIED STUDENTS' ASSOCIATIONAL RIGHTS.

A. The Third Circuit Erred When It Failed To Defer To Congress On This Matter Of Military Importance.

Many members of Congress have warned of the need to remain vigilant and aggressive regarding military recruiting. *See* 149 Cong. Rec. E2081, 2082 (Oct. 17, 2003) (statement of Rep. Skelton) (" . . . many military leaders have expressed their fear that retention and recruiting will decline as troops rotate back home"); 149 Cong. Rec. S12,579, 12,581 (Oct. 15, 2003) (statement of Senator Bingaman) (noting the adverse impact that "prolonged activation [of reservists] has on recruitment and retention").

Moreover, Judge Advocate General ("JAG") officers play a critical role in contemporary military operations. In the military operations of the last decade, JAG officers have: (1) advised commanders on targeting decisions; (2) investigated alleged violations of international law; (3) assisted with the planning and supervision of humanitarian operations; and (4) assisted with the writing of provisional constitutions of emerging democracies in which the United States has helped to displace despotic regimes. *See* Esther Schrader, *War, On Advice of Counsel*, L.A. Times, Feb. 15, 2002, at A1 (describing the pivotal role played by military lawyers during the Kosovo and Afghanistan wars; *see also* Lt. Col. Marc L. Warren, *Operational Law – A Concept Matures*, 152 Mil. L. Rev. 33 (1996) (discussing the evolving role of military attorneys in an operation setting). A lack of military lawyers could increase the likelihood of "law of war" violations by soldiers and unacceptable civilian collateral damage during military operations.

As Congress has made abundantly clear, the military requires the "best and brightest" for each of its occupation specialties, including its cadre of lawyers, because these missions implicate life or death situations. *See* 149 Cong. Rec. H10,373 (Nov. 5, 2003) (statement of Rep. Myrick) (noting the need to "recruit and retain the best and the brightest . . . to insure a strong, able dedicated American military so that this Nation will be ever vigilant and ever prepared.") If Respondents succeed, equal access will be denied to 92 percent of law graduates currently attending American Association of Law School member institutions.

Ensuring the military's continued access to America's top law schools will allow the military to further its own interest in continuing to receive high-quality legal services for America's men and women in uniform. The value of legal assistance from JAG officers depends, in no small measure, on the caliber of individual attorneys the military is able to recruit to serve in the JAG corps.

The various institutional members of FAIR are also members of the National Association for Law Placement ("NALP"), formed in 1971 to promote the exchange of information and cooperation between law schools and employers. According to NALP's "Principles For Law Schools," "[s]tudents' freedom of choice in career decisions should be protected from undue influences." According to NALP, this includes that "[i]n counseling students, career services officers and others within the law school community should avoid interposing either their own values or institutional interests." http://www.nalp.org/content/index.php?pid=16.

Given Congress' explicitly expressed intent to "remain vigilant and aggressive in military recruiting practices," the fact that this "case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference;"[3] and that "Judicial deference . . . 'is at its apogee' when reviewing congressional decision making . . . in the realm of military affairs,"[4] this Court should defer to Congress and reverse the Third Circuit.

As this Court has explained, "[n]ot only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker,* 453 U.S. at 65. "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence . . . " *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973).

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[3] *Rostker*, 453 U.S. at 64-65.

[4] *Weiss v. United States,* 510 U.S. 163, 177 (1994).

B. Even Absent A Military Matter, The Third Circuit Erred When It Failed To Follow *Dole*.

In *South Dakota v. Dole*, 483 U.S. at 207-208, this Court carefully delineated the duties of Congress when it conditions the receipt of funds. In its opinions, this Court has articulated several general restrictions. "The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of 'the general welfare.'" *Id.* (citing *Helvering*, 301 U.S. at 640-641; *United States v. Butler*, 297 U.S. at 65). However, "[I]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Id.* at 207 (citing *Helvering*, 301 U.S. at 640, 645).

"Second, this Court has required that if Congress desires to condition the States receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. at 207-208 (citing *Pennhurst State School*, 451 U.S. at 17).

"Third, this Court's cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *South Dakota v. Dole*, 483 U.S. at 207-208 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). *See also, Ivanhoe Irrigation Dist.*, 357 U.S. at 295 ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof").

"Finally, this Court has noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. at 207-208 (citing *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269-270 (1985); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*); *King*, 392 U.S. at 333 n.34 (1968)).

1. The general welfare and more specific powers were invoked by Congress.

Arguably, Congress does not have to rely only on the General Welfare clause in this case insofar as it is, rather, acting under more definite (and actually enumerated) constitutional powers.[5] This Court has recognized consistently Congress' "broad constitutional power" to raise and regulate armies and navies. *Schlesinger*, 419 U.S. at 510.

Moreover, Congress, by and large, has been entrusted with defining "the general welfare." *Helvering*, 301 U.S. at 640, 645. Further, it is untenable to suggest that Congress providing for the "common defence" of the United States is somehow at odds with the "general welfare," given that both phrases are within the same conjunctive constitutional phrase.[6]

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[5] Congress has the power "To raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker*, 453 U.S. at 59.

[6] "The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . . " U.S. Const. art. I, § 8, cl. 1.

2. Congress was not ambiguous and the recipients were knowledgeable as to terms requested upon receipt.

This Court has held that:

> legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' See, *Steward Machine Co.*, 301 U.S. at 585-598; *Harris v. McRae*, 448 U.S. 297 (1980).

Pennhurst State School, 451 U.S. at 17.

The federal government was in no way ambiguous as to the restraints placed on funding recipients, especially such that "sophisticated" universities were somehow caught unaware as to congressional requirements offered as a condition of the universities' receipt of federal funds. To the extent Congress was in any way unclear, the U.S. Department of Defense made clear those conditions through the promulgation of regulations, as well as through the sending of letters to the universities specifically detailing the implications of the Pombo-Solomon Amendment. *FAIR v. Rumsfeld*, 390 F.3d 219, 228 (3rd Cir. 2004).

3. The raising of a military is served by the Pombo-Solomon Amendment

The objective to be carried by Congress' conditioning of federal funds is that of raising a military to include critically needed JAG officers. Placing military recruiters where career-seeking potential recruits and potential JAG

officers live and study is related directly to Congress' stated objective.

4. The Pombo-Solomon Amendment is not otherwise constitutionally barred.

The Third Circuit erred in finding independent constitutional bars to Congress' conditional grant of educational funds.

This Court has held that its language in earlier opinions stands for the unexceptionable proposition that the power of the purse may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of Congress' broad spending power. *South Dakota v. Dole*, 483 U.S. at 210-211.

No such claim is made by FAIR here and for good reason: FAIR has not, as a condition of accepting the money, been required to violate anyone's constitutional rights![7] Rather, the schools comprising FAIR, after freely

[7] A more straightforward and honest approach would have been for FAIR to assert associational standing and sue the Department of Defense on behalf of its gay student members against whom the Department of Defense allegedly discriminates (or so FAIR argues implicitly). Absent a suspect class, however, an equal protection claim against the Department's "don't ask, don't tell" policy would be subject only to rational basis scrutiny, which, of course, would be fatal to FAIR's claims. Instead, FAIR creatively cloaked its challenge to the "don't ask, don't tell" policy in First Amendment attire in an attempt to achieve strict scrutiny review. FAIR has engaged in this for obvious reasons; such an attack will fail. *See, e.g., Richenberg v. Perry*, 97 F.3d 256, 261

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exercising their rights to associate with the federal government in exchange for funding, now claim that their own associational rights just exercised were somehow violated. The schools comprising FAIR may hardly be said to have had their rights violated when they agreed, as a term of their "contracts," to be so limited.

Amici believe that much insight may be gleaned and many parallels drawn from this Court's likening of conditional spending to the deeply rooted and time-tested principles of contract law. *Supra* Section III(B). Much as a military member or federal employee could be said to have waived voluntarily certain of his free speech rights as a term in his enlistment or employment contract, so too would others, who choose freely to associate with the federal government, be barred from raising constitutional claims, at least those that they have waived in the terms of their "contracts."

It is, of course, those who are not parties to the contract whose rights may not be violated as a condition of the contract, but those are not the rights that FAIR asserts here. Rather, the schools comprising FAIR attempt to assert their own rights despite their status as a "contracting party." Important here is that no third parties' rights are violated as a result of the "contract" between the federal government and the schools, as would be the case in the Court's examples above ("discriminatory state action or the infliction of cruel and unusual punishment"). *South Dakota v. Dole*, 483 U.S. at 210-211. To deny the

(8th Cir. 1996) ("We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in [10 U.S.C.] § 654(f)(3)(A).").

existence of the contract, however, would be to deny the rights of those taxpayers whose only means of limiting government taxation and spending are through their elected representatives.

Under the Constitution, the federal government certainly could not demand that one negative right be waived in exchange for another; that is, it may not demand that a person choose between free exercise and due process, for example. To do so would simply constitute a violation of the waived right. Of course, this is not what is occurring here. Instead, FAIR is exercising its negative right of free association to claim and benefit from a positive "right" bestowed by the federal government. Apparently lost on FAIR is that the federal government has no obligation, and would be free, at its own discretion, to deny all funding of law schools or, for that matter, all educational institutions. Law schools do not have a constitutional "right" to funds with which to operate at taxpayer expense. The ultimate irony is that an organization that calls itself FAIR wants to ignore its required performance under the "contract" and wants the contract declared void, yet still demands performance by the other party, that is, it wants the money.

It is much more likely that the schools comprising FAIR violate the constitutional rights of others by failing to abide by their "agreement" with the federal government. For example, a state school's non-acquiescence to the terms of its own contract with the federal government not only breaches that agreement but, in so doing, denies the free speech rights of federal employees (military recruiters) as well as the associational rights of students such as *amici* Rizzo, Stants, and Wasserman. As such, if Rutgers University engages in content-based speech

regulation and denial of associational rights, it runs afoul of the New Jersey Constitution and must stand ready to be sued under that Constitution by both military recruiters and the students whose access to those recruiters has been limited.[8]

Moreover, the constitutional protection afforded speech ensures not only the right to speak but also, as importantly, the right to "hear, learn and know." *Kleindienst v. Mandel*, 408 U.S. 753, 771 (1972) ("The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know"). Thus, *Amici* Rizzo, Stants, and Wasserman have a constitutional right to hear the speech, both spoken and unspoken, that occurs when military recruiters appear on their campuses. Even if, *arguendo*, FAIR's members had not consented already to the presence of recruiters as a condition of funding, it is beyond cavil that the students' right to hear that speech is at least on par (if not greater) than the right of FAIR's members to bar speech to which they object.[9] That is especially the case here because, just as the dissent at the Third Circuit speculated they were "sophisticated"

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[8] "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, § 6. "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." N.J. Const. art. I, § 18.

[9] FAIR members' claim, with regard to speech, is not truly a plea for the removal of a burden upon their right to speak, but rather is a demand for the imposition of a ban upon the right to speak of those with whom FAIR members disagree.

enough to do,[10] FAIR members and their law professors vigorously exercise their First Amendment rights to excoriate the U.S. Armed Forces whose members are soon to appear on, have just left, or even during their time on campus.

For sophisticated law students such as *Amici* Rizzo, Stants, and Wasserman, their law schools and law professors leave no doubt that: (1) the military engages in activities that they find abhorrent; (2) the activities in which the military engages violate the ethical codes to which they adhere; and (3) they would not admit military recruiters if they did not feel compelled to do so due to the potential loss of federal funds under the Pombo-Solomon Amendment.[11]

Lastly, male students receiving federal financial aid have already expressed a willingness to so associate insofar as the federal government requires draft registration as a condition of individual federal financial aid. *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984).

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[10] "[L]aw school students, and to be sure, their professors, are an extraordinarily sophisticated and well-informed group, who understand perfectly well that their schools admit military recruiters not because they endorse any "message" that may be conveyed by the recruiters' brief and transitory appearance on campus, but because the economic consequences of the [Pombo-]Solomon Amendment have induced them to do so. The likelihood that the military's recruiting will be seen as part of a law school's own message is particularly small when schools can take – and have taken – ameliorative steps to publicize their continuing disagreement with the military's policies and the reasons for their acquiescence in military recruiting. *FAIR v. Rumsfeld*, 390 F.3d at 257 (Circuit Judge Aldisert, dissenting).

[11] *Supra* fn 8. This is also evidenced by FAIR's very filing of this lawsuit.

The schools comprising FAIR exercised their First Amendment rights when accepting federal funds on the terms accompanying those funds. They were free not to do, as at least one college has done. FAIR and its ilk could take a lesson from Hillsdale College, a shining beacon of principle, which has, through exercising its associational rights, chosen not to munch at the federal trough.[12]

IV. EVEN IF, *ARGUENDO*, FAIR'S FIRST AMENDMENT RIGHTS WERE VIOLATED, THOSE RIGHTS ARE NOT ABSOLUTE AND BALANCING THOSE RIGHTS WITH THOSE OF CONGRESS STRONGLY FAVORS PETITIONERS.

Contrasting FAIR's high-minded abhorrence for discriminatory behavior in its Pombo-Solomon amendment challenge with that of their members' assertion to this very Court of a right to discriminate "affirmatively" on the clearly immutable characteristic of race and gender in their admission and professorial hiring policies suggests that no one is abridging FAIR's constitutional right to be wholly inconsistent. *See Grutter v. Bollinger*, 539 U.S. 306 (2003). FAIR argues for its right to be diverse by discriminating against those with immutable characteristics or members of suspect classes while denying Congress the right to adopt policies Congress believes will ensure unit cohesion in the military.

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[12] Hillsdale College has chosen, as matter of principle, not to accept or to allow its students to accept federal financial aid. Through private donors, funds are provided in the form of replacement grants and low-interest student loans. Such awards are in amounts equal to and commonly in excess of the amounts that students eligible for federal aid could receive from federal programs. http://www.hillsdale.edu/admissions/financial_faqs.asp.

But even if, *arguendo*, FAIR's First Amendment rights somehow hung in the balance in this case, any balancing of competing interests weighs heavily in favor of Petitioners. "The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 344 (2003). These First Amendment protections may be circumscribed when necessary to further a sufficiently strong public interest, *Greer v. Spock*, 424 U.S. 828, 842-43 (1976) such as Congress' duty and power "[t]o raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker*, 453 U.S. at 59.

Other judicially sanctified congressional methods of achieving the same goals here speak volumes toward the constitutionality of Congress' conditions on the recipients of taxpayers' money in this case. For example, for a mere fraction of the money it spends on federal financial aid Congress could simply condemn, by eminent domain, office space on every college campus in which to place a recruiting office and the universities would be powerless to stop that action. Certainly, governmental condemnation actions far less related to any genuine "public use" have met constitutional muster in recent years.[13]

[13] *See, e.g., Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Kelo v. City of New London, Connecticut*, ___ U.S. ___, 125 S.Ct. 2655 (2005).

Any associational rights violations claimed by FAIR could be deemed only whimsical in light of this Court's upholding of Section 12(f) of the Military Selective Service Act, which denies federal financial assistance under Title IV of the Higher Education Act of 1965 to male students between the ages of 18 and 26 who fail to register for the draft. *Selective Service System*, 468 U.S. 841 (1984) (held constitutional when challenged on other grounds). If Congress may condition an individual student's right to receive federal financial aid on his having personally registered for the draft, certainly Congress may condition institutional funds on recruiters being given equal treatment with respect to other employers. In fact, the constitutionality of past conscription itself demonstrates that even potential students' First Amendment rights to associate freely stand no chance, on balance, when up against Congress' power to raise an army.

Even if, *arguendo*, on balance the alleged First Amendment rights trumped Congress' constitutionally explicit power to raise an army, it is the infringement of law students' freedom to associate and "right to hear speech" that are implicated by FAIR's attempt to deny equal access to military recruiters. "The corollary to the guarantee of free speech is that 'there be full opportunity for everyone to receive the message.'" *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2nd Cir. 1988) (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J. concurring)).

"A listener's interest enjoys protection just as the speaker's interest finds refuge behind the shield of the First Amendment." *Moore v. City of Kilgore, Tex.*, 877 F.2d 364, 370 (5th Cir. 1989). This Court's jurisprudence well supports this understanding of the First Amendment. *See*

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (citizens have a right to receive advertising information); *Kleindienst v. Mandel*, 408 U.S. 753, 758, 762-65 (1972) (citizens' right to hear alien's speech); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (purpose of First Amendment is to preserve an uninhibited marketplace of ideas in which truth ultimately will prevail; thus, the public must be able to hear the ideas and experiences to be able to participate); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (right of workers to hear what labor organizer had to say abridged by state law requiring organizers to register before soliciting union membership); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (freedom of speech necessarily protects the right of citizens to receive information); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (right to receive information and ideas extends to possession of obscene materials in one's own home); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (citizens have First Amendment right to receive communist political publications from abroad). Throughout all of these cases the First Amendment unwaveringly protects the right of *amici* Rizzo, Stants, and Wasserman to receive information and ideas.

Certainly if citizens have a First Amendment right to receive communist political publications and obscene materials, the receipt of information relating to national security by potential JAG officers from military recruiters deserves as much protection. "There is no support for the proposition . . . that a teacher's academic freedom or a student's right to hear may be abridged simply because a school board dislikes the content of the protected speech."

Fowler v. Board of Educ. of Lincoln County, Ky., 819 F.2d 657, 669 (6th Cir. 1987) (Circuit Judge Merritt dissenting).

CONCLUSION

The Court should grant *certiorari*. Only by so doing may the Court restore the sole means by which taxpayers may challenge deleterious spending; that is, through their elected representatives and the political process. Moreover, the rights of Members of Congress to represent those interests of vital public policy must be restored. Further, this Court should grant *certiorari* because the lower court erred and, in so doing, denied associational rights of prospective employers at federally-funded state and private schools as well as denied improperly the rights of students to associate and to "hear, learn and know" that which the military recruiters have a First Amendment right to convey on campus. Finally, on balance, FAIR's tenuous and non-absolute First Amendment claims pale in comparison to Congress' right to exercise its enumerated power of raising a military.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
**Counsel of Record*
JOSEPH F. BECKER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amici Curiae

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In The

Supreme Court of the United States

DONALD RUMSFELD, ET AL.,
Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF SERVICEMEMBERS LEGAL DEFENSE NETWORK IN SUPPORT OF RESPONDENTS

SHARRA E. GREER
KATHI S. WESTCOTT
SERVICEMEMBERS LEGAL DEFENSE NETWORK
P.O. Box 65301
Washington, DC 20035
(202) 328-3244

LINDA T. COBERLY
Counsel of Record
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

GENE C. SCHAERR
WINSTON & STRAWN LLP
1700 Washington Street, NW
Washington, DC 20006-3817
(202) 282-5000

TYLER M. PAETKAU
JENNIFER GARBER
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111
(415) 491-1000

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QUESTIONS PRESENTED

Did the Third Circuit correctly conclude that the Solomon Amendment imposes an unconstitutional condition on federal funding by requiring colleges and universities, as a condition on their receipt of federal funds, to provide military recruiters with the same support and access provided to any other recruiter, despite the schools' longstanding policy of refusing to abet employers engaged in discrimination?

More specifically, did the Third Circuit correctly refuse to accept the Government's bare assertion that the Solomon Amendment's intrusion on the rights of civilian institutions is necessary and its argument that this Court's cases on military deference preclude further judicial scrutiny?

RULE 29.6 DISCLOSURE STATEMENT

The Servicemembers Legal Defense Network is a non-profit legal services and policy organization. It has no corporate parents or affiliates.

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BRIEF AMICUS CURIAE OF SERVICEMEMBERS LEGAL DEFENSE NETWORK

Pursuant to Supreme Court Rule 37.3,[1] Amicus Curiae Servicemembers Legal Defense Network ("SLDN") submits this brief in support of Respondents. This brief addresses the question whether the Third Circuit correctly refused to accept the Government's bare assertion that the Solomon Amendment, 10 U.S.C. § 983, is necessary to serve a compelling military need and its argument that this Court's cases concerning deference to the military and to Congress in military affairs preclude further judicial scrutiny of the justifications offered for the statute.

INTERESTS OF AMICUS CURIAE

SLDN is a national, not-for-profit legal services and policy organization dedicated to protecting the rights of military personnel affected by the military's "Don't Ask, Don't Tell" policy. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (Nov. 30, 1993) [hereinafter "Don't Ask, Don't Tell"]. SLDN's honorary board is comprised of retired senior military officers and senior enlisted members, and many of the organization's governing board members and staff members are military veterans.

SLDN works to ensure that all Americans have the freedom to serve. Its mission is to end discrimination against and harassment of military personnel affected by

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[1] Counsel for Petitioners and counsel for Respondents have consented to the filing of this brief; letters evidencing such consent are on file with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than SLDN and its members and counsel has made a monetary contribution to the preparation or submission of this brief.

"Don't Ask, Don't Tell" and related forms of intolerance. For more than a decade, SLDN has worked to end the military's discriminatory policy and has provided free legal services to those harmed by "Don't Ask, Don't Tell." SLDN has responded to more than 6,900 requests for assistance and has effected almost three dozen different changes to military policy and practice.

SLDN's work also encompasses the impact of the Solomon Amendment, which effectively requires colleges and universities to assist in the military's practice of discrimination in recruiting as a condition on the receipt of federal funding. In addition, each year, representatives of SLDN speak at colleges and universities across the nation, educating on the discriminatory impact of the "Don't Ask, Don't Tell" policy. Given its familiarity with the military and its many years of work in connection with the policy of "Don't Ask, Don't Tell"—as well as with the Solomon Amendment itself—SLDN not only has a great interest in the outcome of this case but is uniquely well-positioned to assist the Court in its consideration of these important issues.

STATEMENT OF THE CASE

For many years, law schools have followed a policy of refusing to provide recruiting assistance to employers that engage in various forms of discrimination. In the 1970s, law schools began to extend this policy to bar access to employers that discriminate on the basis of sexual orientation, and in 1990, the Association of American Law Schools voted unanimously to include sexual orientation in the list of protected categories in law school non-discrimination policies.

The military has an explicit policy of discriminating on the basis of sexual orientation—a policy known as "Don't

Ask, Don't Tell." As a result, law schools have typically refused to offer the military's recruiters affirmative assistance. Most law schools did not completely bar military recruiters from their campuses, however, instead providing accommodations that would enable military recruiters to reach students without offending the institutions' non-discrimination policies. Those accommodations included, but were not limited to, allowing military recruiters to recruit at alternate locations.

In 1994, Congress passed the Solomon Amendment, which effectively required law schools to exempt the military from their non-discrimination policies. In 2004, after the pendency of this lawsuit (and partly in response to it), Congress amended the statute to expressly require that schools give the military access and assistance that is at least equal in quality and scope to the access provided to any other employer. Ronald W. Reagan Nat'l Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004) [hereinafter "2004 Provision"]. If any part of a college or university fails to comply with the terms of the Solomon Amendment, the entire institution will be denied federal funding, including not only grants and contracts from the Department of Defense, but also virtually any federal grants or contracts available to the academic institutions (other than student aid).

This lawsuit was brought by a coalition of law schools and law faculty who contended that the Solomon Amendment is an unconstitutional condition on federal funding, requiring that law schools speak for, associate with, and host military recruiters and disseminate the military's recruitment message. Although the district court denied the plaintiffs' motion for a preliminary injunction, the Third Circuit reversed, holding that the plaintiffs had established a likelihood of success on the merits of their First Amendment claims. *See Forum for Academic & Institutional*

Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) [hereinafter *FAIR*]. In the course of its ruling, the Third Circuit noted that "the Government ha[d] chosen to submit no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting." *Id.* at 245. The Third Circuit rejected the Government's bare assertion of military need, and it refused to accept the Government's argument that this Court's cases concerning deference in military affairs relieved it of further obligation to demonstrate military need. *Id.* This Court granted certiorari on May 2, 2005. 125 S.Ct. 1977 (2005).

SUMMARY OF ARGUMENT

One of the most important ideals of our system of government is that even in times of military conflict, the rights recognized by the Founders and conferred by the Constitution cannot be arbitrarily impinged. Thus, as this Court recognized more than seventy years ago, "even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 426 (1934).

To be sure, this Court has held that the military is, "by necessity, a specialized society separate from civilian society," and thus "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed." *Parker* v. *Levy*, 417 U.S. 733, 743, 756 (1974). Accordingly, in several cases, this Court has deferred to empirical judgments by Congress and the armed forces with regard to certain "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). Even in cases where deference is appropriate, however, this Court has recognized that it must not "abdicate" its "ultimate responsibility to decide the

constitutional question." *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981).

In this case, the Government and its amici seek to expand the notion of military deference far beyond what this Court has previously recognized. They contend that even if the Solomon Amendment infringes on the First Amendment rights of civilians and civilian institutions, this Court should uphold it without any meaningful review at all, simply because it has an articulable connection to military affairs. Moreover, they ask this Court to ***presume*** that Congress must have found a real military need for the infringement, despite the legislative history that shows that the law was motivated by a desire to punish schools, not by any empirical judgment that the access the military already had to law school and university students was insufficient to meet its needs.

The Government's reliance on military deference in this case must be rejected for several reasons. First, the concept of judicial deference in military affairs has no application where—as here—Congress is regulating the conduct of non-military personnel in non-military space. Second, deference is not warranted here because the Solomon Amendment concerns recruiting on law school and university campuses—a matter with regard to which the military has no unique expertise and about which the judiciary is perfectly well equipped to make judgments. And third, in enacting the Solomon Amendment, Congress conducted no factual investigation and made no studied choice between alternatives, and thus there is no empirical judgment to which the judiciary can defer.

Moreover, regardless of whether concepts of deference apply in this context, this Court cannot ignore the fact that there has ***never*** been a credible showing—either before Congress or in this litigation—that the Solomon Amendment and its 2004 "equal access" provision were no

broader than necessary for the military to meet its recruiting needs. When the Solomon Amendment was originally enacted, there was no reason to believe that law school policies of restricting access to employers who discriminate had actually impaired the military's ability to fill its needs for new lawyers. Indeed, as discussed below, the Department of Defense actually objected to the Solomon Amendment in 1994, on the ground that it was *not* necessary. *See infra* at 19-20. Neither the Government nor its amici have pointed to any evidence that the military is unable to recruit a sufficient number of qualified applicants through the many other means of access it has to students at colleges and law schools. And no one has even suggested that the military was unable to meet its recruiting needs for lawyers because of any inadequacy in the accommodations that were in place before 2001, when the military began to demand "equal access." Under these circumstances, to uphold the Solomon Amendment based on the Government's bare assertion of military need would indeed be an "abdicat[ion]" of this Court's responsibility to decide constitutional questions.

ARGUMENT

The modern concept of military deference is based on two ideas: Congress's power to raise and regulate armies and navies, U.S. CONST. art. I, § 8, cl. 12-14, and the judiciary's presumed lack of competence in certain matters of military strategy and operations. This Court has recognized both of these rationales in granting "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker* v. *Goldberg*, 453 U.S. 57, 66 (1981).

The second of these ideas—the courts' presumed lack of competence in military affairs—is critical to the concept of

military deference. *See id.* at 65. Military deference cannot be justified purely by reference to the fact that Article I of the Constitution gives Congress the power to raise and regulate armies. After all, Congress ***always*** acts in furtherance of powers granted by Article I, and yet this Court does not always defer to its judgments.[2]

Significantly, "deference does not mean abdication." *Rostker*, 453 U.S. at 70. Congress is not "free to disregard the Constitution when it acts in the area of military affairs," *id.*, and thus this Court has made clear that its deference in military affairs does not insulate congressional or military judgments from meaningful judicial review. *Id.* at 70 ("[s]imply labeling the legislative decision 'military' . . . does not automatically guide a court to the correct constitutional result"); *see also United States* v. *Robel*, 389 U.S. 258, 263-64 (1967) ("the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit"). This Court will defer—not to rhetoric or constitutional arguments—but to specific "professional judgment[s] of military authorities concerning the relative importance of a particular military interest." *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986). And even where the doctrine of military deference applies, it does not excuse the Government from showing the extent to which its restriction on constitutional rights is actually tailored to serve important governmental interests.

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[2] As then-Judge Clarence Thomas observed in a non-military context: "We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce." *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992).

Indeed, only last Term, this Court undertook careful constitutional review of the Government's detention of an American citizen as an enemy combatant, despite the fact that the Government had invoked the principle of deference to the Executive Branch in military judgments. *See Hamdi* v. *Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2651-52 (2004) (plurality op.). As the Court explained:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

Id. at 2649-50; *see also id.* at 2655 (Souter, J., concurring) (judiciary is charged with "deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war"). Thus even when deference is appropriate, the judiciary still bears the responsibility of deciding whether the statute or military regulation infringes on the liberties guaranteed in the Constitution.

In this case, the Government contends that this Court should defer to the bare assertion by the statute's sponsors that it is necessary to compel civilian institutions to associate with and speak on behalf of the military.[3] As discussed

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[3] The Government contends that if the Solomon Amendment comes within the scope of the First Amendment, this Court's analysis under the intermediate standard for expressive conduct in *United States* v. *O'Brien*, 391 U.S. 367 (1968), should be conducted with due deference to Congress's military judgments about the need for and breadth of the statute. Brief for the Petitioners at 35-39 [hereinafter "Gov't Br."]. The

below, this position represents a dramatic and unjustified expansion of military deference, both with regard to the scope of the doctrine and with regard to the nature of the deference Congress enjoys when the doctrine applies.

I. This Court's military deference cases have no application here because of the nature of the congressional action under review.

By its nature, the congressional action at issue here is entitled to no special quantum of deference. This Court should reject the Government's and its amici's reliance on concepts of military deference for three different reasons. First, the notion of military deference does not apply in the context of a law that burdens the rights of civilians and civilian institutions in civilian space. Second, neither the military nor Congress has unique expertise beyond that of the judiciary with regard to the effectiveness of various methods of recruiting university and law school students, and the courts are fully capable of considering such matters themselves. And finally, the legislative history makes clear that Congress did not make any empirical judgments about whether the Solomon Amendment and its 2004 "equal access" provision are necessary—and no broader than necessary—for the military to meet its recruiting needs.

A. Principles of deference in military affairs do not apply to laws that direct the conduct of civilian institutions in civilian space.

The most obvious flaw in the Government's position on deference is that it seeks to apply the doctrine to a law that burdens the First Amendment rights of civilians in civilian space. This Court's deference cases do not go nearly this far.

Government does not argue that military deference could save the Solomon Amendment if it is subject to strict scrutiny.

Indeed, this Court has recognized the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972).

This Court has held that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974). Thus, for example, this Court has allowed the military discretion to determine how it will prosecute crimes committed by military personnel—even when they occur off-duty and in civilian space. *See, e.g., Solorio* v. *United States*, 483 U.S. 435 (1987) (military court has jurisdiction over service member to prosecute crime committed off-duty and in private home). Similarly, the Court has engaged in deferential review with regard to restrictions placed on the free speech of civilians in military space. *See, e.g., Greer* v. *Spock*, 424 U.S. 828, 839 (1976) (rejecting First Amendment challenge by political candidates to rule barring campaigning on base, because military authorities had adopted a "considered" policy, "objectively and evenhandedly applied," of keeping military activities on base free from partisan political campaigns); *United States* v. *Albertini*, 472 U.S. 675 (1985) (declining to scrutinize whether rule barring certain civilians with past security problems from entering military base for demonstration was most appropriate or narrow means of preserving security).

Unlike the laws and regulations at issue in these cases, however, the Solomon Amendment is directed solely at the conduct of civilian institutions in their own space. The Solomon Amendment forces civilian institutions to speak for the armed forces, to associate with them, and to assist in their discriminatory practices. Thus it does not concern a specific regulation within military society; it concerns how civilian institutions must behave when the military reaches into civilian society. The Third Circuit recognized this

important distinction and thus properly concluded that the principle of deference to military judgment was not applicable. *FAIR*, 390 F.3d at 245 n.27. ("[T]his case involves the military's compelled presence on the campuses of civilian institutions.").

This Court's decision in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), (*cited in* Gov't Br. at 39), does not support the application of deference principles with respect to a law imposing a burden on the constitutional rights of civilians in civilian space. In *Rostker*, this Court invoked the notion of military deference in the course of considering an equal protection challenge to Congress's decision to compel only men to register for the draft. Unlike this case, however, *Rostker* was fundamentally about a decision by Congress ***not*** to burden civilians unnecessarily. Recognizing that "[t]he purpose of registration was to prepare for a draft of combat troops," *Rostker*, 453 U.S. at 76, the Court concluded that congressional judgments about who should be required to participate in the draft "are based on judgments concerning military operations and needs" and necessarily began with a military judgment about the "'proper role of women in combat,'" *id.* at 68 (quoting S. REP. No. 96-826, at 157 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2647). "Since women are excluded from combat, Congress concluded that [women] would not be needed in the event of a draft, and therefore decided not to register them." *Id.* at 77.[4]

Moreover, the constitutional claim in *Rostker* was brought by male registrants for the draft—individuals who

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[4] As discussed below, *Rostker* is an example of how this Court has proceeded to engage in meaningful judicial review even after noting that Congress is entitled to special deference in military affairs. *See Rostker*, 453 U.S. at 69-70, 87-88. The Court rejected the Government's argument that the usual intermediate scrutiny for sex-based classifications should be replaced in the military context with rational basis review. *Id.*

were on their way toward possibly becoming military personnel and who were objecting to the necessarily non-civilian process of draft registration. *See id.* at 68 ("Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one."). Here, however, the burden falls not on prospective service members themselves but rather on civilian universities and law schools, who are being compelled to assist the military in its effort to reach prospective service members. Thus the impact of the statute is well within the "civilian world" that this Court discussed in *Rostker*. And when Congress takes action that burdens constitutional rights in civilian society, it cannot avail itself of the doctrine of military deference, let alone excuse itself from judicial review simply on the ground that its action has some connection to the military.

From this perspective, this Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968)—discussed at length in the parties' briefs—is instructive precisely because it *is not* about military deference. Indeed, *O'Brien* shows that this Court applies ordinary First Amendment analysis—and not any deferential standard—in reviewing a military-related justification on civilian speech. The petitioner in *O'Brien* was convicted of burning his draft card as part of a public protest, and the case concerned whether the law against the destruction of draft cards impermissibly burdened his First Amendment rights. Significantly, this Court did not defer to Congress's judgment that the law was supported by an important interest and was sufficiently narrow. Instead, the Court decided the case under a general First Amendment principle that would apply to any case concerning expressive conduct, and it engaged in its own factual analysis of the purposes served by the law—including the specific administrative role of the draft card and the information contained on it—and whether there were "alternative means" of assuring the continuing availability

of selective service cards. *Id.* at 376-82. Thus even though the case concerned a judgment related to military staffing—and the conduct of a potential future member of the armed services—this Court did not hesitate to inquire into the sufficiency of the interest underlying the statute.[5]

In this case as well, the judiciary bears the responsibility of assessing whether the Solomon Amendment's burden on the First Amendment rights of civilian institutions is necessary and sufficiently narrow to survive constitutional scrutiny. As this Court recognized in *Laird* v. *Tatum*, "[W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury." 408 U.S. 1, 15-16 (1972); *see also Gilligan* v. *Morgan*, 413 U.S. 1, 12 n.16 (1973). Thus the principle of deference in military affairs is not applicable or appropriate when the Government is compelling speech by civilian institutions to civilians in civilian space.

B. Deference is not warranted here because the Solomon Amendment does not concern a matter that is within the military's unique expertise and inappropriate for judicial resolution.

This Court's military deference cases are also inapplicable here because the issue on which the Government is demanding deference—the sufficiency and effectiveness of various methods of recruiting university

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[5] *O'Brien* is instructive only in the sense that this Court applied the same constitutional analysis in a case regarding draft cards that it would apply in any case involving expressive conduct. In the instant case, a more stringent First Amendment analysis applies, given that the Solomon Amendment is about compelled speech. As in *O'Brien*, however, this Court should not alter its First Amendment analysis simply on the ground that the military is involved.

and law school students—is one about which the military has no unique experience beyond what the judiciary itself has. This is an issue the judiciary is capable of considering on its own, in the same manner and with the same amount of deference as when any other Act of Congress is challenged.

As discussed above, the modern doctrine of military deference is based on two ideas: Congress's constitutional power to raise and regulate armies, and the judiciary's presumed lack of competence with respect to certain matters of military strategy and operations. This Court made this point clear in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), which is cited by the Government's amici in describing the scope of the deference doctrine.[6]

Gilligan concerned a claim brought by a group of Kent State students after the Governor of Ohio called in the National Guard in a period of civil disorder and several students were injured or killed. Among other relief, the students sought "a judicial evaluation of the appropriateness of the 'training, weaponry and orders' of the Ohio National Guard," *id.* at 5, and demanded that the district court "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard." *Id.* at 6. Not surprisingly, the Court declined to grant this very broad and intrusive relief, which would have vested control of internal military matters with the judiciary on an ongoing basis. The Court explained that "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject ***always*** to civilian control of the Legislative and Executive

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[6] *See* Brief of Amici Curiae U.S. Congressman Richard Pombo et al. at 9, 12 [hereinafter "Pombo Br."]; Brief of Amici Curiae Eagle Forum Education and Legal Defense Fund at 8-10 [hereinafter "Eagle Forum Br."].

Branches." *Id.* at 10 (emphasis in original). According to the Court, it was "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.*

For similar reasons, this Court has deferred to the military's judgment concerning certain specific military interests, following meaningful judicial review. For example, this Court has declined to intervene in the relationships between enlisted service members and their superior officers (*Chappell* v. *Wallace*, 462 U.S. 296 (1983)) and in military promotion policies and assignments (*Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953)). The Court has also deferred to the "considered professional judgment of the Air Force" with regard to the importance of standardized uniforms in preserving "the necessary habits of discipline and unity." *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986) (rejecting Jewish service member's claim that military's rule against non-uniform headgear infringed his right to free exercise).

Where the issue at hand does not fall within the military's unique expertise, however, there is no basis for the judiciary to review regulations or congressional action with increased deference. In *Frontiero* v. *Richardson*, for example, this Court considered an Equal Protection challenge to a statute requiring female service members to show proof of their husbands' dependence before they could seek dependent benefits, while requiring no such proof from male service members who claimed their wives as dependents. 411 U.S. 677 (1973). The Court applied strict scrutiny and found that the military's goals of "administrative convenience" and cost savings were insufficient justifications for the sex-based classification. *Id.* at 688-91. In so holding, the Court did not defer to Congress's presumed conclusions about the need for this legislation. *See id.* at 689. ("In order to satisfy the demands

of strict judicial scrutiny, the Government must demonstrate" that the selected statutory scheme is actually cheaper and more convenient than alternatives).[7]

In this case, too, the Government is demanding that this Court defer to the judgments of Congress and the military with respect to matters that fall well outside the scope of the military's unique expertise and that do not concern matters of military strategy and operations, about which this Court has a presumed lack of competence. *See Gilligan*, 413 U.S. at 10. There is no doubt that the military has a compelling interest in maintaining a strong volunteer force, including college and law school graduates. But with regard to whether the military has a compelling need to recruit on campus in the same fashion as other employers do—and whether other, less burdensome alternatives to the Solomon Amendment would accomplish the same recruiting goals—this Court is equally able to reach a conclusion. Indeed, these questions have far more in common with an employment discrimination case in federal court than they have with this Court's cases granting deference to congressional and military judgments regarding specific military needs and operations. For this reason as well, deference to Congress here is not warranted.

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[7] Other courts have expressly recognized that not all judgments that relate to the military are entitled to deference. *See Anderson v. Laird*, 466 F.2d 283, 296 (1972) (per curiam) (Bazelon, C.J., concurring in judgment) (refusing to grant special deference to judgment of military regarding requirement that cadets at military academies attend religious services because requirement did not "involve programs vital to our immediate national security, or even to military operational or disciplinary procedures"); *see also Hartmann* v. *Stone*, 68 F.3d 973, 985 (6th Cir. 1995) (refusing to grant military deference regarding regulation against religious child care services on military base, because "the Army has wandered far afield," having ventured beyond "where the link to its combat mission is clear").

C. In enacting and amending this legislation, Congress made no empirical judgments or studied choices to which this Court can defer.

Military deference is inapplicable here for another reason as well: there is no reasonable basis from which to presume that Congress made empirical judgments or studied choices to which this Court may now defer. This Court has granted deference only with respect to Congress's "studied choice of one alternative in preference to another" in terms of furthering goals related to "military needs and operations." *Rostker* v. *Goldberg*, 453 U.S. 57, 69 n.6, 72 (1981). Even the Government characterizes this Court's deference cases as relating only to "***empirical*** judgments." Gov't Br. at 39 (emphasis added).

Even setting aside Congress's failure to make factual findings, the legislative history shows that Congress did not base its adoption of the Solomon Amendment and the 2004 "equal access" provision on any credible factual evidence that those measures were necessary for successful military recruiting. There is no reason to believe that Congress considered any less restrictive alternatives to these enactments and concluded that those alternatives would be insufficient. Indeed, even the Government has characterized Congress's decision as merely a "common-sense conclusion that personal access to students on campus furthers recruitment." Reply Brief for the Petitioners in Support of Petition for a Writ of Certiorari at 7-8; *see also* Gov't Br. at 36 ("Congress reasonably concluded that equal access to students enhances the military's recruitment efforts."). But even if it were true that the Solomon Amendment "furthers recruitment," that would not be sufficient to justify a significant intrusion on the First Amendment rights of civilians. *See Boy Scouts of America Inc.* v. *Dale*, 530 U.S. 640, 648 (2000) (under strict scrutiny, requiring proof that goals cannot be achieved through

means significantly less restrictive of First Amendment freedoms); *O'Brien*, 391 U.S. at 377 (under intermediate scrutiny, requiring proof that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

Moreover, the legislative history strongly indicates that Congress's true purpose in enacting the Solomon Amendment was not military need at all but rather ***retribution***—to punish uncooperative law schools for their intransigence. *See, e.g.*, 140 CONG. REC. H3863 (daily ed. May 23, 1994) (statement of Rep. Pombo, co-sponsor of Solomon Amendment) (statute would "send a message over the wall of the ivory tower of higher education" that schools' "starry-eyed idealism comes with a price"); 140 CONG. REC. S8173 (daily ed. Jul. 1, 1994) (statement of Sen. Thurmond) ("It is not unfair to refuse to pay money to an institution which denies access to their facilities. It is just good business.").

Most of the legislative history supporting the enactment of the Solomon Amendment in 1994 consists of generalized assertions regarding the importance of recruiting, without supporting findings or evidence, such as statistics or surveys, showing a real need for the Solomon Amendment. *FAIR*, 390 F.3d at 225-27. The bill's co-sponsor, for example, asserted generally that the practice of many institutions of denying access to military recruiters under an anti-discrimination policy represented a threat to national security and that "[r]ecruiting is the key to an all-voluntary military." 140 CONG. REC. H3861 (daily ed. May 23, 1994) (statement by Rep. Solomon). Representative Goodlatte similarly stated that "[c]ampus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people." 142 CONG. REC. H5716 (daily ed. May 30, 1996) (statement of Rep. Goodlatte); *see also* 150 CONG. REC. H1705 (daily ed. Mar. 30, 2004) (statement of Rep. Cunningham) ("We have an all-

voluntary force, and to allow access on to our campuses is a good thing.").[8] But as the Third Circuit explained, "invoking the importance of a well-trained military is not a substitute for demonstrating that there is an important governmental interest in opening the law schools to military recruiting." 390 F.3d at 245 (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 89 (1981)).

Other than commenting on the general desirability of on-campus recruiting, neither the sponsors nor the military proffered any evidence to show that the military was actually having trouble recruiting lawyers or college graduates, or that the Solomon Amendment would materially enhance the military's recruiting results. The Department of Defense itself actually ***objected*** to the

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[8] *See* 141 CONG. REC. E13 (daily ed. Jan 4, 1995) (statement of Rep. Solomon) ("I am told by the Pentagon that schools across the country are getting the message and preparing to accommodate recruiters rather than lose their precious funding. But to pick up the stragglers who are still not complying, further action is necessary.... Barring military recruiters is an intrusion on Federal prerogatives, a slap in the face to our Nation's fine military personnel, and an impediment to sound national security policy."); H.R. REP. 108-443, at 3 (Mar. 23, 2004) (accompanying Ronald Reagan Nat'l Defense Authorization Act, FY 2005, Pub. L. No. 108-375, 118 Stat. 1811) ("The committee believes that at no time since World War II, has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs."); 151 CONG. REC. H316 (daily ed. Feb. 2, 2005) (statement of Rep. Kline) (exclusion of military recruiters "threatens to severely damage the ability of the military to recruit the highly qualified candidates necessary during a time of war"); 140 CONG. REC. E1127 (daily ed. Jun. 8, 1994) (statement of Rep. Bereuter) ("In banning military recruiters, the universities are making wholly inappropriate value judgments about the Armed Forces, and they undermine the absolutely essential efforts of the Armed Forces to recruit and retain the highest quality military force.").

proposed law as "unnecessary" and "duplicative" of earlier legislation that had enabled the Department to withhold its own funding from any institution that prohibited military recruiting on campus. *See* 140 CONG. REC. H3864 (daily ed. May 23, 1994). And in expanding the Solomon Amendment two years later in 1996, Representative Solomon merely repeated the asserted generalized "need" for the changes, without citing any evidence in support:

> [R]ecruiting is the key to our all-voluntary force, which has been such a spectacular success. Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and to colleges, by informing young people of the increased opportunities that an honorable military career can provide . . . . That is why we need this amendment.

142 CONG. REC. H 6887 (daily ed. Jun. 26, 1996) (statement of Rep. Solomon).

Even more dramatically, Congress also heard no facts and considered no alternatives in the fall of 2004, when it passed H.R. 3966—the provision that amended the Solomon Amendment to require expressly that colleges and universities provide military recruiters with the same access and support they provide to private recruiters. Throughout the late 1990s, most law schools had provided the military with some form of limited access, and there was and is no reason to believe that those accommodations were inadequate for the military's recruiting needs. Yet without any reason to believe it was necessary, Congress proceeded to enact the most intrusive portion of the Solomon Amendment—the provision that requires schools to speak for, associate with, and host military employers just as they do employers who comply with the schools' non-discrimination policies.

The scope of the equal access provision itself confirms that it was intended to punish schools, rather than to serve a specific military need. If Congress had truly believed that recruiting on campus with the school's full assistance was critically important—and had no acceptable alternative—it would have compelled schools to allow the military to recruit on campus whether or not other employers were offered the same opportunity.

The only discussion of the 2004 equal access provision occurred in a single floor debate in the House of Representatives, and in a Committee on Armed Services Report. *See* 150 CONG. REC. H1695, H1702 (daily ed. Mar. 30, 2004); H.R. REP. 108-443 (Mar. 23, 2004). This discussion quite transparently revealed the true motivation behind the provision: a desire to "reestablish the pre-eminence of the military on our campuses across this country" and to address the district court's decision in this litigation, which questioned the Department of Defense's ability to demand equal access to campuses for military recruiters on penalty of withholding federal funds. 150 CONG. REC. H1706 (daily ed. Mar. 30, 2004) (statement of Rep. King) (specifically citing the instant case). As one skeptical member of Congress recognized, Congress never answered the question of, "Is this the best way to do it?," with regard to the equal access requirement. *Id.* at H1708 (statement of Rep. Abercrombie). Instead, the bill was "rammed through the Committee on Armed Services . . . without a single hearing" and no opportunity to debate. *Id.* at H1709 (statement of Rep. Meehan).[9]

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[9] Other members of Congress have acknowledged the lack of evidence or findings as to the necessity for the equal access provision. 150 CONG. REC. H1699 (daily ed. Mar. 30, 2004) (statement of Rep. Frank) ("[N]o one really believes and the military has not said, oh, we are being so hindered by these recruitment restrictions that we cannot get enough people. This is to penalize those institutions that are just standing up particularly for the principle of nondiscrimination and particularly for the principle that

Moreover, the only evidentiary material proffered in support of the 2004 "equal access" amendment consisted of a single letter from an official of the Department of Defense. H.R. REP. 108-443, pt. 1, at 7 (Mar. 23, 2004) (Letter from David S.C. Chu, Under Secretary of Defense, to Hon. Duncan L. Hunter, Chairman of Committee on Armed Services of Mar. 16, 2004). This letter, however, did not document any need for the equal access amendment to the statute. Instead, it railed against "some colleges and universities [that] remain intransigent or outright opposed to compliance." *Id.* The "particularly egregious" examples that it offered related not to military need, nor even to denied access, but rather to unwelcome protests: "[M]ilitary recruiters and prospective recruits have been forced to endure verbal abuse and harassment" at the hands of "gauntlets of taunting fellow students and faculty impeding the path" of potential recruits "to designated interview rooms." *Id.* Setting aside the question of protests, however —which the 2004 provision did not address—this letter did not even suggest that the military's recruiting effort was disadvantaged by the institutions' measures to accommodate military recruiting while adhering to their anti-discrimination policies.[10] Thus there is no reason to

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qualified members of their university communities ought not to be discriminated against and punishing them to reinforce an unfair policy hurts the military."); 150 CONG. REC. H1708 (daily ed. Mar. 30, 2004) (statement of Rep. Abercrombie) (issue deserved full discussion, which it had not had, and "some common sense, some common legislative sense" to address the issue "in a manner that will resolve it under constitutional methodology that is worthy of this body").

[10] *See also* 151 CONG. REC. H312 (daily ed. Feb. 2, 2005) (statement of Rep. McGovern) ("[T]here is no lack of access to for the military on America's campuses. Every university that wants an ROTC program has one. According to the *Wall Street Journal*, more than 52,000 college students are enrolled in ROTC programs, up from 48,000 in 2000. Many credit feelings of patriotism engendered by the September 11 attacks, and it comes as no surprise that military enlistment by college graduates has also increased since the events of September 11.").

believe that Congress actually concluded—or had any basis for concluding—that the access military recruiters were receiving before the "equal access" provision was inadequate to meet military recruiting targets.

In light of this history, it is apparent that Congress did not make any judgment at all about whether the Solomon Amendment's intrusions on schools were necessary or even beneficial to the military's recruiting efforts. And there is no reason to believe that Congress considered the question whether less burdensome measures—like the accommodations schools made for the military in the years before the "equal access" requirement—were insufficient to meet the military's needs. Thus even if some deference were appropriate in the context of a law that regulates the conduct of civilians in civilian space, Congress made no empirical judgments or considered choices to which this Court may defer.

II. Regardless of deference, this Court cannot ignore the fact that neither the Government nor its amici have shown that the Solomon Amendment is necessary—and no broader than necessary—to serve a compelling military need.

Throughout this litigation, the Government has presented no evidence whatever showing that the Solomon Amendment is the least restrictive means to achieve a compelling interest, or—under the *O'Brien* analysis—that its intrusion on the rights of schools "is no greater than is essential" to serve the military's recruiting needs. *O'Brien*, 391 U.S. at 377. As the Third Circuit explained, "this is not a case where the Government has presented *less* evidence than might otherwise be required; here the Government has presented *no* evidence." 390 F.3d at 245 n.26 (emphasis in original); *see also id.* at 235 ("The Government has failed to proffer a shred of evidence that the Solomon Amendment

materially enhances its stated goal."). And the Government has not even argued that it cannot recruit effectively through alternative methods that would be less burdensome on the First Amendment rights of colleges and universities. *Id.* at 242.

Whether or not this is an appropriate case for deference, this Court cannot ignore the utter absence of factual justification—both in Congress and in this litigation—for a statute that intrudes so heavily on the rights of civilians. As discussed above, even in cases where this Court has noted that it would defer to the determinations of Congress in military affairs, it still must ensure that the constitutional rights of American citizens are protected. *See Rostker*, 453 U.S. at 70 ("Simply labeling the legislative decision 'military' . . . does not automatically guide a court to the correct constitutional result."). Indeed, in *Rostker*—upon which the Government and its amici rely as an instructive example of judicial deference in military affairs—this Court refused to change its constitutional analysis simply because the decision related to the military. *Id.* at 69 (rejecting the Government's argument that a sex-based classification in draft registration should be reviewed under only a rational basis standard). Thus, even after explaining that deference was appropriate in that case, the *Rostker* Court proceeded to assess the registration statute carefully in terms of Congress's purpose and the means it chose:

> This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft. . . . The fact that Congress and the Executive have decided that women should

> not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.

Id. at 78-79. Here too, whether deference is appropriate or not, the Court must still meaningfully assess the purposes of Congress and the means it chose, and it cannot ignore the absence of factual evidence supporting that choice.

Without specific proof—either in the legislative history or in the record—it is far from reasonable to assume that the military has no alternative but to demand the assistance of law schools and universities for its recruiting efforts. As the Third Circuit observed, the military is different from other employers and has many options for recruiting:

> Unlike a typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. And it may use sophisticated recruitment devices that are generally too expensive for use by civilian recruiters, such as television and radio advertisements. These methods do not require the assistance of law school space or personnel. And while they may be more costly, the Government has given us no reason to suspect that they are less effective than on-campus recruiting.

390 F.3d at 234-35 (footnote omitted).

With respect to the equal access requirement added to the Solomon Amendment in 2004, the Government's presumption of necessity is even more tenuous. Schools are required by law to provide the military with contact information for students (10 U.S.C. § 983(b)(2))—a requirement that obviously puts the military at a

tremendous advantage over other employers in terms of the ability to contact students directly. Particularly in light of that requirement, there is no reason whatever to suppose that the military needs the same sort of access and support from colleges and law schools as would an employer that may not be able to contact students directly.

It is also far from reasonable to assume that this Nation's armed services require the same kind of introduction to students as would a small law firm or a firm in a distant city—about which students may be completely unaware. And even if a particular group of students may be unaware that the military offers employment opportunities in their chosen field, there is no reason to conclude that a mailing, a poster, or a campus newspaper advertisement would not be sufficient to alert them. Many new lawyers may be predisposed to seek out military service after law school because they or members of their families have served previously, either in the active military or in the Reserve Office Training Corps. The Army, for example, has a program through which active duty commissioned officers may attend law school "at government expense if funding permits."[11] For these lawyers, there is no reason to believe that on-campus recruiting would make any difference at all.

Further, once students have been made aware of the opportunities for military service in their respective fields, it is unlikely that having to conduct the interviews themselves at a different location would materially impair the results of the military's recruiting effort. Off-campus recruiting may even be beneficial to the military, as the Third Circuit noted, in that it removes potential recruiters and recruits from the protests that often accompany military recruiters when they

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[11] *See* ArmyStudyGuide.com, Army Programs: The Funded Legal Education Program, *available at* http://www.armystudyguide.com/programs/info/flep.htm.

actually conduct their interviews on campus. *See* 390 F.3d at 245.

Evidence in the record underscores the lack of any need for the "equal access" amendment in 2004. From the time that the Solomon Amendment was enacted in 1994 until 2001, when the military began to demand "equal access," military recruiting did not suffer from law schools' refusal to give the military the exact same access it would give to other employers. Indeed, military recruiters routinely thanked law schools for the access and assistance they were granted and marveled at having to turn qualified applicants away. *See, e.g.*, Letter from Steven H. Levin, U.S. Army Judge Advocate Recruiting Officer, to Irene Dorzback, Assistant Dean of New York University School of Law (Nov. 3, 1998), *at* J.A. at 169. ("Competition has become very keen in the past few years for both our intern and our JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position.").

In briefing in this Court, various amici have attempted to fill the void in the record left by the Government's failure of proof, though only with anecdotal and similarly conclusory evidence.[12] ***None*** of this evidence supports the conclusion that the military has no effective alternatives for recruiting—or in other words, that forcing colleges and universities to host, support, and speak for military recruiters is necessary for the military to meet its needs.

For example, the Judge Advocates Association asserts that the on-campus interview "is the most critical part of the Judge Advocate recruiting process," (Brief of Amici Curiae Judge Advocates Association at 10-11 [hereinafter "Judge

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[12] *See, e.g.*, Judge Advocate's Br. at 5-20, 24-30; Eagle Forum Br. at 8-10, 15-16; Pombo Br. at 10-12; Brief of Amici Curiae Adm. Charles S. Abbott et al. at 7-10, 14-20, 27-30 A1-A10.

Advocate's Br."] (citing Declaration of Rear Admiral Jeffrey L. Fowler, U.S. Navy)), which was submitted in support of the Government's application for a stay of the Third Circuit's decision.[13] At most, however, this Declaration indicates that more than 50% of the Navy JAG Corps' new hires each year "had their first meeting with Navy personnel during an on-campus interview." *Id.* at 16 (quoting Rear Admiral Jeffrey L. Fowler, U.S. Navy). It does not establish that these applicants would not have joined Navy JAG without an on-campus interview or that the Navy had no other way to reach these students.

For all these reasons, there is no reason to conclude that the Solomon Act is "essential"—or even beneficial—to military recruiting. Indeed, the lack of evidence presented by the Government on this point further supports the conclusion that the Solomon Amendment was the result of rhetoric, rather than real military need. And without a real and compelling justification for the Solomon Amendment's intrusion on First Amendment liberties, it cannot be upheld.

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[13] Although the Judge Advocates Association also relies on other declarations of military officers, those declarations are no more specific and similarly do not provide evidence in support. *See* Judge Advocate's Br. at 12 (quoting Declaration of Brigadier General Walter E. Gaskin, United States Marine Corps) ("'Access to law students that is inferior to that provided other employers precludes the [military] from being able to reach potentially interested students in the manner that is most convenient and attractive to the students.'"); *Id.* at 13 (citing Declaration of Major General Thomas J. Romig, U.S. Army) (refusal to enforce the Solomon Amendment will "ultimately result in accession of less talented Judge Advocates"); *Id.* (citing Amended Declaration of Major General Jack L. Rives, U.S. Air Force) ("Each year the United States Armed Forces must recruit hundreds of Judge Advocates in order to effectively defend the nation"); *Id.* at 19 (quoting Declaration of Under Secretary of Defense for Personnel and Readiness Dr. David S. C. Chu) ("'Developing, funding, and implementing alternative methods of recruiting would unavoidably take time, and we do not have the luxury of living with impaired recruiting capabilities while the process plays out.'"); Rear Admiral Jeffrey L. Fowler, United States Navy) ("[T]he on-campus interview . . . is the most critical part of this process.").

CONCLUSION

For all the reasons discussed above and in the Respondents' briefs, the judgment of the Third Circuit should be affirmed.

Respectfully submitted.

SHARRA E. GREER
KATHI S. WESTCOTT
SERVICEMEMBERS LEGAL DEFENSE NETWORK
P.O. Box 65301
Washington, DC 20035
(202) 328-3244

LINDA T. COBERLY
Counsel of Record
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312)-558-5600

GENE C. SCHAERR
WINSTON & STRAWN LLP
1700 Washington Street, NW
Washington, DC 20006-3817
(202) 282-5000

TYLER M. PAETKAU
JENNIFER GARBER
WINSTON & STRAWN LLP
101 California Street
San Francisco, CA 94111
(415) 491-1000

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STUDENT/FACULTY ALLIANCE FOR MILITARY EQUALITY ("SAME") AND OUTLAWS IN SUPPORT OF RESPONDENTS

CARMINE D. BOCCUZZI, JR.
Counsel of Record
Catharine M. Clark
Kyle C. Wong
CLEARY GOTTLIEB
STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000
Counsel for Amici Curiae

September 21, 2005

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Student/Faculty Alliance for Military Equality ("SAME") and OutLaws respectfully submit this *amicus curiae* brief in support of Forum for Academic and Institutional Rights ("FAIR"), *et al.*, Respondents. Pursuant to Rule 37.3(a) of the Supreme Court Rules, this brief is filed with the consent of the parties.[1]

INTEREST OF THE *AMICI CURIAE*

Amici curiae are two official law school organizations who filed suit seeking an injunction to prevent the Department of Defense ("DOD") from enforcing the Solomon Amendment, 10 U.S.C. § 983, against Yale Law School. On January 31, 2005, in a companion case, Yale Law School professors won a permanent injunction against the DOD, effectively mooting the students' case. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005). A short time before this decision, the Third Circuit Court of Appeals granted a nationwide preliminary injunction against the enforcement of the Solomon Amendment in *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) ("*FAIR* case"). *Amici* support the decision in the Third Circuit and respectfully submit this *amicus curiae* brief, both as students with a unique perspective on the importance of the nondiscrimination policy and on the harm to *amici's* First Amendment rights caused by the Solomon Amendment, and also as litigants who have tested the government's case.

SAME is a student organization at Yale Law School formed in response to the school's forced waiver of its nondiscrimination policy for military recruiters. *See* Declaration of Darren Cohen, dated Feb. 18, 2004, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) ("*SAME* case") ("Cohen Decl.") ¶¶ 3, 9 ("SAME is . . . committed to

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[1] *Amici curiae* state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than *amici*, their members or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of Court.

education and activism in support of the Yale Law School nondiscrimination policy."). SAME is an active and diverse organization that is comprised of students of all races, religions, genders and sexual orientations. *Id.* ¶11. SAME professes no opinion, pro or con, regarding the historic or current mission of the military except as to its continued discrimination against gays and lesbians. In fact, certain members of SAME would be proud to serve in the armed forces were it committed to full equality. *See infra* at I.

OutLaws is a student organization at Yale Law School for lesbian, gay, bisexual and transgender ("LGBT") students. At the time litigation began, OutLaws had 30 official members. Declaration of Michael Kavey, dated Feb. 18, 2004, *SAME* case ("Kavey Decl.") ¶¶1, 5. Today, OutLaws has about twice as many members, almost all of whom identify as gay, lesbian or bisexual. The organization creates a social forum for LGBT students and educates members of the Yale Law School community and others about issues affecting LGBT persons. *Id.* ¶4. As an official student organization, OutLaws abides by, and advocates, the policy and practice of nondiscrimination. *Id.* ¶¶7, 11.

Amici are concerned that a reversal of the Third Circuit's decision will effectively abrogate Yale Law School's nondiscrimination policy as it applies to sexual orientation. The *SAME* case and the related *Burt* case—which were litigated through summary judgment—demonstrate the unconstitutionally overbroad manner in which Petitioners wish to enforce this law and highlight the inaccuracies in Petitioners' submissions to this Court:

- Contrary to Petitioners assertions, *see* Brief for the Petitioner's, dated July 19, 2005 ("Pet. Br.") at 37, military recruiters do not seek treatment equal to other employers, but demand the undeniably *special* treatment of exemption from Yale Law School's consistently applied nondiscrimination policy. Unlike every other employer, Petitioners

wish to discriminate against student members of *amici* and nevertheless participate in the official law school recruiting program.

- Despite having agreed to accommodations during the 1990s—accommodations that gave the military access to Yale Law School students as required by the Solomon Amendment—the DOD now claims that nothing short of special treatment can serve their recruiting needs.
- While Petitioners repeatedly state that if institutions like Yale Law School wish to apply a nondiscrimination policy consistently, they can simply choose not to "associate with the government's money," *see* Pet. Br. at 12, Yale Law School receives no federal funding. Accordingly, the threatened withdrawal of almost $300 million in federal funding is nothing more than a blunderbuss punishment directed at the entire university as retribution for the exercise of First Amendment rights by Yale Law School students and faculty.

Amici's Litigation Against Petitioner Rumsfeld in the District of Connecticut

In 1978, at the behest of a few of its courageous students, Yale Law School amended its nondiscrimination policy to prohibit discrimination on the basis of sexual orientation. Consistent with this policy, which directly benefits and protects students, only employers who certify that they do not discriminate on the basis of any protected category, including sexual orientation, are permitted to participate in the official Yale Law School recruiting programs.[2] That policy

[2] The nondiscrimination policy forbids discrimination based on age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender, sexual orientation and marital, parental and veteran status; it is at the heart of Yale Law School's mission and guides all official law school activities. Declaration of Robert Burt,

governed recruiting at Yale Law School for years without exception until the military abruptly changed its tune and forced its way into the program.

In 2001, despite the government's past satisfaction with access to students and campus, the military, through its Judge Advocate General's Corps ("JAG"), sought to participate in the school's official interview program without signing the required nondiscrimination statement. As with all other employers who refuse to sign this statement, the military was not allowed to participate in the official interview program. In response, the DOD informed Yale Law School that its nondiscrimination policy violated the Solomon Amendment. The government then threatened to withdraw almost $300 million in federal funding from the rest of the university. In light of this unprecedented coercion, on September 4, 2002, the faculty of Yale Law School voted to suspend the nondiscrimination policy temporarily and to permit the military to participate in the official law school recruiting program. Burt Decl. ¶¶19-22.

As sexual orientation was added as a protected category to the nondiscrimination policy at the behest of students, it is not surprising that students took action to remedy the suspension of a nondiscrimination policy designed to protect them and to stop the government's interference with the school's message of nondiscrimination. In 2003, both SAME and OutLaws filed suit against the DOD to enjoin enforcement of the Solomon Amendment.

At the same time, in response to the continued threats of the government to withdraw funding to the entire university, forty-four Yale Law School faculty members filed suit on October 16, 2003. *Burt*, 322 F. Supp. 2d 189. The faculty members asserted that the Solomon Amendment unconstitutionally violated their First and Fifth Amendment rights. *Id.*

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dated Apr. 6, 2004, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) ("*Burt* case") ("Burt Decl.") ¶¶ 6, 7.

The district court agreed with the faculty that the Solomon Amendment both unconstitutionally compelled speech and interfered with the faculty's message as an expressive association. *Burt*, 354 F. Supp. 2d at 182-83, 187. Based on these conclusions, the court held that "the Solomon Amendment is hereby declared unconstitutional as applied, and the defendant is enjoined from enforcing it." *Id.* at 189-90.

The *Burt* court's conclusion that the Solomon Amendment is unconstitutional is correct. As the legislative history demonstrates, the statute has, since its inception, been targeted at institutions that convey a message of nondiscrimination, and no others. The injunction in *Burt* barring enforcement of the Solomon Amendment has allowed Yale Law School students to receive and express once again the law school's message of nondiscrimination, and this Court should affirm the extension of that protection to students at similarly situated educational institutions like the plaintiff schools in *FAIR*.

SUMMARY OF ARGUMENT

The nondiscrimination policy at Yale Law School, which directly benefits *amici*, has protected gay and lesbian students from discrimination for over 25 years. The government seeks to change this by forcing the school to abandon its longstanding message of, and commitment to, nondiscrimination so that military recruiters can receive special treatment in a school-run and privately-funded recruiting program. This case is not about the military regulating its own personnel and internal affairs but rather about its unconstitutional attempt to coerce private actors at private institutions in violation of their First Amendment rights. Thus, *amici* respectfully submit that the Solomon Amendment violates *amici's* right to freedom of association and their right to receive information, as protected by the First

Amendment, and also unconstitutionally chills *amici's* freedom of speech.

ARGUMENT

I. The Principle And Practice Of Nondiscrimination At Yale Law School

Yale Law School, like many of the law school members of FAIR, has a longstanding policy of speaking out against, and protecting students from, discrimination. In 1978, law student Robert Weiss approached Professor Owen Fiss "about the fact that the Law School's written nondiscrimination policy did not bar discrimination against gays." Declaration of Owen Fiss, dated Apr. 1, 2004, *Burt* case ("Fiss Decl.") ¶3. Weiss told Fiss that "he and other gay students at the Law School felt excluded from the academic community because, while the Law School's policy was to protect most minority students, it did not even address the issue of sexual orientation." *Id.* Weiss's urgings spurred the law school faculty "to amend the nondiscrimination policy to include protection against discrimination on the basis of sexual orientation," thereby sending the message "that the Law School treated discrimination based on sexual orientation with the same moral seriousness with which we addressed other forms of discrimination." *Id.* ¶¶5, 6.

The school's nondiscrimination policy does more than convey a message of nondiscrimination and protect students from employers who discriminate on the basis of sexual orientation. The policy also governs admission procedures, scholarship grants, housing assignments and grading methods. Burt Decl. ¶6. In short, it has become an indelible part of Yale Law School, and it infuses all aspects of the students' experiences at the school. The nondiscrimination policy is critical to the maintenance of an atmosphere that fosters open discourse and groundbreaking legal

research, Declaration of William N. Eskridge, Jr., dated Sept. 18, 2003, *FAIR* case ("Eskridge Decl.") ¶¶3, 12, 18, 20, as well as to the inculcation of "the values that are central to law—such as justice, equal treatment, liberty and due process." Burt Decl. ¶¶2, 3-5. Student members of *amici* chose to attend Yale Law School recognizing that they were there to learn "not only legal rules, but also standards of conduct, ethics and values for practical application in the professional world." Declaration of Fadi Hanna, dated Feb. 18, 2004, *SAME* case ("Hanna Decl.") ¶8.

Consistent with the nondiscrimination policy, the Career Development Office ("CDO") at Yale Law School requires every employer seeking to participate in the law school's official interview program to sign a nondiscrimination statement, pledging not to discriminate on any of the bases protected by the policy, including sexual orientation. Any employer who refuses to sign the statement may not participate in the official interview program. *See* Declaration of Barbara Safriet, dated Apr. 5, 2004, *Burt* case ("Safriet Decl.") ¶¶3-5; Declaration of Theresa Bryant, dated Apr. 5, 2004, *Burt* case ("Bryant Decl.") ¶¶3, 6. Because the military refuses to sign the statement, it, like any other employer that does not sign, is not allowed to interview in the school-sponsored program. *See* Bryant Decl. ¶6; Safriet Decl. ¶¶3-6 (in the 1990s, the Christian Legal Society did not participate in the interview program after it refused to sign the nondiscrimination policy but participated in on-campus debate about discrimination). Thus, the military, in trying to gain greater access than that afforded to other discriminatory employers, seeks special, rather than equal treatment. *See* Declaration of Adam A. Sofen, dated Feb. 18, 2004, *SAME* case ("Sofen Decl.") ¶6 ("No other employer who would refuse to hire me because I am gay is permitted to participate as JAG does.").

The enforcement of this policy does not, as some have argued, prevent students from hearing the military's message or from associating with military recruiters. Students may invite any outside group, including the military, to speak on campus. Safriet Decl. ¶¶ 9-10. Moreover, Yale Law School explicitly permits employers who are interested in contacting and recruiting students directly to do so, without requiring the employer to sign the nondiscrimination statement. *Id.* ¶7. The CDO advises students to use the National Association for Law Placement Directory, which is available online at no cost and provides information on prospective employers, including the military. Bryant Decl. ¶4. Neither the Yale Law School administration nor its nondiscrimination policy can, nor seeks to, prevent the military from directly accessing, contacting, recruiting, interviewing or hiring Yale Law School students. The military is simply prohibited from participating in the school's official recruiting program because its presence with nondiscriminatory employers violates the nondiscrimination policy. *See, e.g.*, Declaration of Matthew Alsdorf, dated Feb. 18, 2004, *SAME* case ¶¶ 3-5.

The nondiscrimination policy is not just an esoteric creature of the ivy tower, as some proponents of the Solomon Amendment suggest, *see, e.g.*, 140 Cong. Rec. H3860-63 at H3863 (May 23, 1994) (statement of Rep. Pombo), but is rather a policy borne out of real world experiences and concerns. The nondiscrimination policy protects members of SAME and OutLaws from the type of discrimination that many have faced in other contexts. When selecting a law school, these students chose to attend Yale Law School in great part because of the high value it placed on promoting nondiscrimination on the basis of sexual orientation. Fadi Hanna was denied an interview with a consulting firm, which had previously recruited him, after he came out as a gay man. Hanna Decl. ¶6. When Fadi asked why the firm

would no longer offer an interview, the recruiting department told him simply that he "wouldn't fit in well." *Id.* As Fadi explained in the district court: "It was important to my decision [to attend law school] that Yale Law School had such a [nondiscrimination] policy and that the gay and lesbian students with whom I spoke were comfortable at Yale Law School." *Id.* ¶5. In her former employment, Heather Sias, a recent graduate of the school, "encountered discrimination against gay men and lesbians, mostly in the form of inappropriate and immature comments made by coworkers." Declaration of Heather Sias, dated Feb. 19, 2004, *SAME* case ¶2. Because of this experience, Heather "was interested in attending only those law schools with active and accepted gay and lesbian communities." *Id.* ¶¶2-3.

The importance of this policy and its message of nondiscrimination is further highlighted by the experience of Elizabeth Hillman, a former Yale Law School student who, prior to law school, had served in the military. *See* Declaration of Elizabeth L. Hillman, dated Apr. 7, 2004, *Burt* case ("Hillman Decl.") ¶¶1-2. Elizabeth, who had received awards and commendations during her service, "resigned because as an Air Force officer and a lesbian, [she] could not speak her mind or explain [her] life in an open and honest way." *Id.* ¶3. At Yale Law School, she recounts:

> I found for the first time in my professional career an open and tolerant community. I met openly gay graduate students on my first visit to campus; I attended an open meeting of Gay, Lesbian, Bisexual and Transgendered organizations...
>
> I was only able to speak and write openly because the Law School created an atmosphere in which I felt confident that I could express my views about the

> military's policy, and about other political and social issues, without fear of reprisal or intimidation. . .
>
> The existence and enforcement of the Law School's nondiscrimination policy made an enormous difference to me: it allowed me . . . to take a public stand on issues I considered critical to my personal life, my professional career, and to larger issues of social justice.

Id. ¶¶ 5, 8-9. It is a testament to the policy's efficacy that Elizabeth found a welcoming academic environment at Yale Law School.

Amici's interest in the nondiscrimination policy's message and enforcement, however, is not limited to those gay and lesbian students whom it directly protects but also includes their heterosexual counterparts, who deeply value the school's policy and perceive its enforcement as central to Yale Law School's academic message and pedagogical mission. As one heterosexual student has explained, "[t]he nondiscrimination policy is one of the ways in which Yale Law School has conveyed to me the importance of the principle that individuals should not be judged on the basis of arbitrary personal characteristics." Declaration of John Tye, dated Feb. 17, 2004, *SAME* case ("Tye Decl.") ¶6.

Finally, the faculty's adoption of the nondiscrimination policy in 1978 was motivated by a desire to include all students, regardless of sexual orientation, as full members of the Yale Law School community, not by anti-military or anti-government motives. *See* Fiss Decl. ¶¶ 4-7; Eskridge Decl. ¶¶ 15-17. *Amici* brought suit to protect their First Amendment rights and uphold the principle and practice of nondiscrimination at Yale Law School, not to oppose the military or any of its former or current policies, other than its policy of discrimination against gay and lesbian individuals. As one student has stated: "I believe that the work

done by JAG is important and meaningful. I would support JAG participation in the Yale Law School interview program if JAG did not discriminate against my classmates who are gay or lesbian." Tye Decl. ¶8. Another member of SAME, Adam Sofen, a recent graduate who is openly gay, explained to the district court his wish, grounded in two generations of military service in his family, to have a career in the armed forces:

> Numerous members of my family have served in the armed forces. My grandfather served as an officer in the United States Navy. . . . Two of my uncles also served in the Navy. . .
>
> From a young age, a career in the military interested me. My family members' service in the Navy convinced me that military service is a profoundly honorable career . . . [and] also demonstrated to me that a career in the armed forces is a uniquely unadulterated form of national service. . .
>
> To be a member of the military would offer the opportunity to defend the [ ] freedoms and tradition of tolerance [our country espouses], a task I feel I have a duty to fulfill in some manner. Given my interest in military service, a career in the [JAG] . . . would have been an option for me, were it not for the military's "Don't Ask, Don't Tell" policy.

Sofen Decl. ¶¶2-5.

II. The Enforcement Of The Solomon Amendment Against Yale Law School

From the time the nondiscrimination policy was enacted in 1978 until 2001, the DOD did not challenge Yale Law School's recruiting program or policies or seek greater

access to the campus or students on campus. Safriet Decl. ¶¶ 5-6. In 1996, Lt. Col. Michael Child asked the Law School to explain its policy with regard to military recruiting on campus. Letter from Child to Kronman of 2/28/96 (Safriet Decl., Ex. A). Dean Barbara Safriet responded that Yale Law School was in compliance with the Solomon Amendment and that the law school provided recruitment opportunities to the military on an equal basis with other employers. *See* Eskridge Decl. ¶ 35; Safriet Decl., Ex. B. The military did not formally respond to this particular letter, but in a conversation with Dean Safriet, Lt. Col. Child indicated that the military's concerns had been satisfied, even admitting that he "was wrong as to his initial perceptions" of the recruiting program and the military's access to students. *See* Safriet Decl. ¶ 10. The nondiscrimination policy was left unchallenged. *See id.* ¶¶ 6, 9-10. Similar correspondence occurred again in 1998 with the same result: the military left the nondiscrimination policy undisturbed. *Id.* at ¶¶ 11-12.

In 2001, in a sharp reversal of its stance over the previous seven years, the DOD notified Yale Law School that the Solomon Amendment allowed the DOD to "deny the use of certain federal funds" to Yale Law School should the school continue to apply its longstanding nondiscrimination policy to the military. *Burt*, 322 F. Supp. 2d at 195. The DOD further requested that the school "clarify [its] policy regarding military recruiting on the campus of Yale University as well as Yale Law School." *Id.* (citation omitted) (quoting Letter from Moore to Kronman of 3/16/98 ("Moore Letter") (Joint App. at 103)). On the basis of Yale's response, the letter promised that "Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract." *Id.* (quoting Moore Letter (Joint App. at 104)). Despite discussions between Yale Law

School and the DOD, in May 2002, Colonel Tate informed Yale that "[u]nless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements . . . we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial." *Id.* (quoting Letter from Tate to Levin of 5/29/02 (Joint App. at 112)).

The government has characterized this request, and similar requests at other schools, as seeking "equal treatment" with other employers. Letter from Carr to Levin of 5/29/03 ("Carr Letter") (Joint App. at 129). But there is nothing "equal" about it. Rather than seeking equal treatment, the government insists on special treatment because it expects to be treated better than other employers who fail to sign the nondiscrimination statement. Two state supreme courts have found that military recruiters cannot, under the guise of "equal treatment," demand entry into recruiting events that exclude discriminatory employers. *See Gay & Lesbian Law Students Ass'n v. Bd. of Trs.*, 673 A.2d 484, 493 (Conn. 1996) (state statute "requires that the law school treat military and nonmilitary recruiters alike and because the law school must ban nonmilitary recruiters who discriminate on the basis of sexual orientation, the law school must similarly ban all military recruiters"); *Lloyd v. Grella*, 83 N.Y.2d 537, 547 (1994) ("Plainly, when school[s] exclude recruiters 'on the same basis,' like those who statedly discriminate against homosexuals, the statute's special admittance pass for the military . . . does not override the even-handed exclusion of all employers who proclaim their discriminatory policies."). The logic of these decisions is compelling.

As a direct consequence of Colonel Tate's threat, the Yale Law School faculty, faced with the prospect of the uni-

versity losing hundreds of millions of dollars each year, voted to suspend its nondiscrimination policy temporarily in order to comply with the DOD's demands. Burt Decl. ¶¶20-21. Despite this concession, which, as one member of the faculty recognized, "transform[ed] our message of tolerance into an appearance of hypocrisy" and "seriously compromised" the "protective environment that [Yale Law School] sought to create for [its] students," *id.* ¶¶24, 29, the DOD was still unwilling to certify Yale Law School as compliant under the Solomon Amendment. Instead, William J. Carr, the Acting Deputy Under Secretary for Military Personnel Policy, informed the school of his belief that Yale, despite its temporary suspension of its nondiscrimination policy, remained "in violation of federal law" and warned that unless the law school changed its policy, he would "recommend . . . that Yale University be determined ineligible for Department of Defense funding." *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 at 196 (quoting Carr Letter (Joint App. at 133)).

When the faculty was forced to suspend the nondiscrimination policy under threat of funding withdrawal, Petitioners corrupted and interfered with Yale Law School's longstanding message and policy of nondiscrimination. As one student stated, "[w]hen the professors continue to permit the military to participate in the law school interview programs in violation of the nondiscrimination policy, as it is written, they fail to live by the principles they propound in the classroom and elsewhere." Declaration of Lea Bishop, dated Feb. 18, 2004, *SAME* case ¶4. Kenji Yoshino, a former student and current professor at Yale Law School, observed that "the fact that the military is allowed to discriminate against my students with the forced assistance of the Law School makes it impossible for me properly to communicate and teach the values of equality and justice

that are essential to the law." Declaration of Kenji Yoshino, dated Apr. 7, 2004, *Burt* case ¶ 8. He is troubled that the inevitable result of this government coercion was that "[t]he Law School is not the place it was when I was a student, and the educational experience is not the same." *Id.*

For these various reasons, Yale Law School students have vigorously opposed the government's decree that the school abandon its First Amendment rights by dismantling the nondiscrimination policy. Students have protested in a variety of ways, including distributing pins and pamphlets at recruiting events to express support for the nondiscrimination policy, marching with students' mouths gagged to express the silence imposed by the application of the Solomon Amendment, and draping the Law School's walls in black to protest the DOD's unconstitutional actions. *See* Cohen Decl. ¶¶ 13-14; Fiss Decl. ¶¶ 10-11.

III. The Solomon Amendment Is Unconstitutional

A. The Solomon Amendment Unconstitutionally Infringes *Amici's* First Amendment Rights

1. *Amici's* Right To Expressive Association Has Been Violated

Both the Third Circuit and the district court in *Burt* correctly held that the Solomon Amendment is unconstitutional because it violates the right to freedom of association. The Supreme Court has long recognized that a right to associate "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and

in shielding dissident expression from suppression by the majority."). To find that a statute violates the right to expressive association, a court must determine that an expressive association exists, that the government's action has significantly affected the group's advocacy of its viewpoint and that the state does not have an interest justifying the burden imposed on the group's expressive association. *Dale*, 530 U.S. at 648-58. Under this analysis, it is clear that the Solomon Amendment violates *amici's* First Amendment rights.

The Yale Law School community is an expressive association because the school is a highly selective institution with an educational purpose, one supported and defined by its nondiscrimination policy. *See Roberts*, 468 U.S. at 620 (size, purpose, policies and selectivity are among factors which define an expressive association). Through its nondiscrimination policy, Yale Law School has communicated, and its students have received, an educational message "both expressly and by example." *Dale*, 530 U.S. at 650. That message is one of diversity and inclusion—two values this Court has recognized as vital to legal education. *See Grutter v. Bollinger*, 539 U.S. 306, 332-33 (2003) ("Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."). Moreover, universities have "experience and expertise" in determining the preferred student body make-up to further the "educational benefits that diversity is designed to produce." *Id.* at 330, 333.[3]

[3] It would be ironic to permit the law school's nondiscrimination policy to be set aside given the obvious role played by the policy in fostering diversity, the value focused on by the Supreme Court in *Grutter* as central to the educational process. 539 U.S. at 329-332 (identifying

Student members of *amici* are part of the expressive community of Yale Law School "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *See Roberts*, 468 U.S. at 622. As active members of Yale Law School, as individuals who chose to become part of this expressive community, and as the creators of the law school's message of nondiscrimination, *see* Fiss Decl. ¶¶3-5, Yale Law School students are in a unique position to advocate in favor of an even-handed application of the nondiscrimination policy. Members of SAME and OutLaws seek both to prevent the government from interfering with the school's associational rights as manifested in the application of its nondiscrimination policy and to receive the message from the school in an unadulterated form.

The DOD's threats to enforce the Solomon Amendment violate Yale Law School's freedom of association by forcing the school to set aside its nondiscrimination policy as applied to one specific protected category. The DOD's actions "unconstitutionally burden this freedom" by their "intrusion into the internal structure or affairs of an association." *See Dale*, 530 U.S. at 648 (citation omitted). Requiring an institution to change one of its governing rules surely qualifies as such an intrusion. *See* Carr Letter (Joint App. at 133) (accusing Yale Law School of violating federal law because it had "waived its [nondiscrimination] policy with respect to participation in the interviewing

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educational benefits derived from diversity). Indeed, the Court noted the amicus brief of high ranking retired officers and civilian leaders of the U.S. military which discussed the importance of diversity. *Id.* at 330. *See also* Consolidated Brief of Becton et al., *Grutter v. Bollinger*, 2003 WL 1787554 at *8 (2003) (Nos. 02-241, 02-516) (quoting George Washington in underscoring "the vital importance of direct association among diverse individuals in education and in the profession of arms").

program" twice, but had pointedly "decline[ed] to *suspend permanently* the application of its policy to the military") (emphasis added).[4] Furthermore, this intrusion into Yale Law School's governing principles incontrovertibly alters the school's message on an important political issue, "impair[ing] the ability of the group to express those views, and only those views, that it intends to express." *Id.*; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) (overturning liability judgment, emphasizing "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues") (citation omitted).

As the Court has explained, "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648; *cf. Roberts*, 468 U.S. at 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."). Here it is no different; Yale has "been forced to permit a discriminatory employer to participate in [its] recruiting program alongside all of the other employers who have pledged to abide by [its] nondiscrimination policy." Burt Decl. ¶24; *see also* Hanna Decl. ¶9 ("[T]he law school's current message on non-discrimination seems to be that discrimination is permissible whenever there is a real benefit to turning a blind eye to discrimination against a particular group."). Like the boycotting consumers in *Claiborne*, 458 U.S. at 907, Yale Law School students do

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[4] *Dale* does not stand for the sole proposition that forcing an organization to accept a member who is unwanted would impair the organization's freedom of association. The violation in *Dale* was a subset of a broader category of constitutional violations, which forbids the government from intruding into a group's internal workings and structure. 530 U.S. at 648.

not want to associate with those who discriminate, which led them to push successfully for the creation of a community that opposes all forms of discrimination, including discrimination on the basis of sexual orientation. The Solomon Amendment violates *amici's* expressive association rights and thus cannot be allowed to continue impairing Yale Law School's ability to voice its opinion on nondiscrimination, regardless of that message's acceptance in society at large.[5]

2. *Amici's* Right To Receive Information Has Been Violated

The *Burt* court was correct in its finding that the Solomon Amendment impermissibly coerced the faculty into assisting the DOD to send the government's message of discrimination. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 178 (D. Conn. 2005); *see also FAIR v. Rumsfeld*, 390 F.3d 219, 240 (3d Cir. 2004). Because the speakers of the message of nondiscrimination were unconstitutionally coerced, the rights of Yale Law School students as the intended recipients of the faculty's message of nondiscrimination in

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[5] Under Secretary of Defense Carr characterizes Yale's nondiscrimination policy as resulting in "the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs." Carr Letter (Joint App. at 132). Thus, it is necessary to clarify exactly what the message of Yale Law School is. While Yale Law School respects service in the armed forces, it does, through its nondiscrimination policy, assert that the "Don't Ask, Don't Tell" policy makes the military a less than ideal career choice for a law student because of the Law School's vision of full equality for all persons regardless of sexual orientation. *See* Bryant Decl., Ex. E (CDO website listing JAG as recruiter with caveat that JAG violates the nondiscrimination policy but has forced its way into CDO programs because of the Solomon Amendment). While this view may be unpopular, it is not for the heavy hand of government to suppress it.

its unadulterated form have similarly been infringed. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (right to receive information and ideas "is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); *see also PG&E v. Pub. Utils. Comm'n of Cal.*, 476 U.S. 1, 8 (1986) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."). The Solomon Amendment accordingly violates the First Amendment rights of Yale law faculty and students, by tainting the message of nondiscrimination as spoken and as heard. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 754 (1976) (upholding challenge to statute penalizing pharmacists for advertising prescription prices given plaintiffs' right "to receive information that pharmacists wish to communicate to them through advertising and other promotional means").

The message of nondiscrimination is crucial to the law school's academic environment, which was for some students the first place where they could freely express their personal opinions. *See, e.g.*, Hillman Decl. ¶8 ("I was only able to speak and write openly because the Law School created an atmosphere in which I felt confident that I could express my views about the military's policy, and about other political and social issues, without fear of reprisal or intimidation."); *see also* Hanna Decl. ¶8 ("A law school should prepare its students . . . by teaching not only legal rules, but also standards of conduct, ethics and values for practical application in the professional world."). The academic freedom promoted by the message of nondiscrimination absent government coercion is vital to students, not just professors. *See Keyishian v. Bd. of Regents of the Univ.*

of the State of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ."). Indeed, Yale Law School students have long viewed nondiscrimination as a value so central to the school's mission that they were instrumental in the adoption of the nondiscrimination policy and in the continuing pressure to maintain it.

Now, rather than receiving Yale Law School's message of nondiscrimination, Yale Law School students are told that discrimination on the basis of sexual orientation is negotiable. As explained by recent graduate Michael Kavey, the message currently transmitted is "that discrimination based on sexual orientation is less objectionable than other forms of discrimination." Kavey Decl. ¶ 11. As the *Burt* court recognized, this is not the message that Yale Law School wants to send to its students. *Burt*, 354 F. Supp. 2d at 178 (Solomon Amendment forced faculty to change message from categorical statement in favor of nondiscrimination into "an equivocal statement that includes the disclaimer" exempting the military). Such interference with the message received by the students is no more permissible under the First Amendment than was the removal of books from school library shelves in *Pico*, 457 U.S. at 853, or the prohibition on price advertising in *Virginia State Board*, 425 U.S. at 754. In all of these situations, the government has interfered with a message that a willing speaker wants to send to a willing listener.

3. The State Interest Does Not Satisfy Strict, Or Even Intermediate, Scrutiny

Where laws directly impact upon a speaker's First Amendment rights, the government's conduct can be upheld only if it serves "compelling state interests, unre-

lated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648; *Roberts*, 468 U.S. at 623. The burdens on students' First Amendment rights should be subject to the heightened scrutiny that was applied in *Dale* or *Roberts*, not only because of the serious First Amendment issues regarding the students' right to receive the law school's message, but also because these cases control the analysis for measuring the burdens on students' right to expressive association. Moreover, student *amici* are entitled to extra consideration under the doctrine of academic freedom. *See supra* at III.A.1; *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). The law necessarily falls under strict scrutiny analysis.

The court in *Burt* and the Third Circuit correctly determined that the Solomon Amendment did not meet the narrow tailoring requirement, finding that "the military has ample resources to recruit through alternative means." *Burt*, 354 F. Supp. 2d at 182 (citing *FAIR*, 390 F.3d at 234).[6] First, at Yale Law School, the military has never

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[6] In addition, the penalty imposed falls short of meeting strict scrutiny because the government's threat to withhold, in the 2002-2003 fiscal year alone, nearly $300 million in funding, used in part for biomedical research on cancer, AIDS and asthma (but not for recruitment or placement of any students with an employer), *see* Declaration of John Maloney, dated Apr. 15, 2004, *Burt* case ¶¶ 4, 18, 20, Ex. A, is anything but a means "significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648; *Roberts*, 468 U.S. at 623. The school could sacrifice its own educational message, or risk the loss of funding to the university, a separate institution. In passing this law, the government knew that law schools were presented with such a choice. 140 Cong. Rec. H3860-63, at H3861 (May 23, 1994) (statement of Rep. Solomon) (declaring that the statute would "tell[] recipients of Federal money at colleges and universities that if you do not

been denied access to students. To the contrary, military recruiters are welcome on campus at the invitation of a single student or student group, and the names and contact information for every student are made available to JAG, which remains free to contact the students directly. Safriet Decl. ¶¶ 7-8; Bryant Decl. ¶¶ 10-11. This fact alone amply demonstrates the marked failure of the government to tailor the law narrowly since the DOD has at its disposal a panoply of less speech-restrictive means of recruitment, including not only access to contact information for each student (allowing recruiters potentially to speak with all students as opposed to meeting only those students who sign up for a JAG interview) but, as the Third Circuit noted in *FAIR*, loan repayment programs and sophisticated media campaigns. *FAIR*, 390 F.3d at 235. Likewise, no weight should be accorded to *amicus* Judge Advocates General Association's claims that JAG recruiting is far more effective when face-to-face meetings occur since they are essential to the recruiting process. *See* Judge Advocates Brief at 14-15. No one prevents the military recruiters from conducting face-to-face interviews with Yale Law School students. Moreover, as Judge Hall aptly observed in *Burt*, "approximately 50% of Yale law school students obtain employment as judicial law clerks [in] a recruiting process that does not use the [official recruitment] program or any form of on-campus recruiting," significantly

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like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment rights. [sic] But do not expect Federal dollars to support your interference with our military recruiters."). Forcing the school to abandon its own principles and message is an infringement on its First Amendment rights, which cannot be justified by the state's articulated interest. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996) (constitutional violation where government makes "a concerted effort to coerce [the] relinquishment [of protected constitutional rights]").

undercutting the military's "assertion that access to the [recruitment] program is necessary to law school recruiting." *Burt*, 354 F. Supp. 2d at 182 n.27.

Second, requiring any greater degree of access to students is not justified by a compelling state interest under First Amendment principles. While defendant may contend that being part of the official interview program is more convenient, mere convenience is not a compelling government interest. *See Searcey v. Crim*, 642 F. Supp. 313, 317 (N.D. Ga. 1986), ("[T]here has been no showing that the military lacks alternative means of contacting high school students; the mere convenience of contacting them at high schools is not a compelling state interest."), *aff'd in part, vacated in part*, 815 F.2d 1389 (11th Cir. 1987).

Third, despite the fact that military recruiters have participated in Yale Law School's official interview program from fall 2002 through fall 2004, few students have signed up for interviews and not a single student interviewed has been offered, nor accepted, a position with the military through the official law school recruiting program. *Burt*, 354 F. Supp. 2d at 182; Bryant Decl. ¶15. Notwithstanding this abject failure, the military insists on continuing to recruit at Yale Law School, yet in contrast, schools with policies "of pacifism based on historical religious affiliation," are exempt from the application of the Solomon Amendment. 10 U.S.C. §983(c)(2). Pacifist schools, however, do not restrict their enrollment to pacifists, or even to students of a single faith,[7] and their graduates serve in the military just like those of any other school. *See, e.g.*, *Obituaries*, Kan. City Star, Apr. 22, 2003 at B4 (Joseph Samuel Balestrieri served in the Army during World War II, grad-

[7] *See, e.g.*, http://www.earlham.edu/policies/rel-life.html (policies of pacifist Earlham college noting that "Earlham is made up of people of various faiths and religious practices and people of no religious faith").

uated from Earlham College in 1947 and worked for 23 years for the U.S. Air Force). This mismatch is the inevitable result of Congress' arbitrary determination to respect the First Amendment views of schools with a pacifist message but not those of schools with a message of nondiscrimination. Given that Congress has concluded that the military can recruit effectively while respecting a school's pacifist views, the government's position here is all the more suspect. The Court should find that the Solomon Amendment is not narrowly tailored and, therefore, is unconstitutional.

Finally, even when the government tries to regulate less protected forms of speech, the Court explicitly requires that the restriction actually foster the government's interest. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300-01 (2000) (regulation of symbolic conduct must further the government's interest); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (where a law burdens commercial speech, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the government defends a regulation on speech as a means to . . . prevent anticipated harms it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate . . . that the regulation will in fact alleviate these harms in a direct and material way."). Thus, even if subjected to intermediate scrutiny, the Solomon Amendment must fail because its infringement of plaintiff's First Amendment rights does not actually achieve the government's interest of recruiting law students.

B. The Solomon Amendment Unconstitutionally Chills Speech

The Constitution makes clear that "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) (citations omitted). The problem of "unconstitutional vagueness is further aggravated where . . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Id.* at 372 (applying vagueness doctrine in First Amendment context). Here, as organizations interested in protesting the military's participation in Yale Law School's recruitment program, *amici* have no way to ensure that the exercise of their free speech rights will not result in the violation of the Solomon Amendment. The law is therefore void for vagueness and accordingly, should be declared unconstitutional.

The statutory language permits the Secretary of Defense to deny funding to the university if he determines that Yale Law School "has a policy or practice . . . that either prohibits, or in effect prevents [military recruiters] . . . from gaining access to campuses, or access to students . . . that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. §§ 983(b)-(b)(1) (2004). Military officials and members of Congress have explicitly contemplated that the requirement of access "at least equal in quality and scope" can (and should) be used to curb protected First Amendment activities such as student protests. *Id.* at (b)(1). David S. C. Chu, Under Secretary of Defense, advocated for the inclusion of this language to spare military recruiters and prospective recruits who "have been forced to endure verbal abuse and harassment, gauntlets of

taunting fellow students and faculty impeding the path to designated interview rooms." H.R. Rep. No. 108-433, pt. 1, at 7 (2004). Representative Howard McKeon, arguing that the statute was necessary to prevent students from engaging in protests, reported that "[s]hockingly, at one of the most prestigious colleges in this country, . . . potential recruits were harassed and detained by protestors.'" 150 Cong. Rec. H1702-01, at H1705 (daily ed., Mar. 30, 2004) (statement of Rep. McKeon).

Amici "protested when the military recruited at the Yale Law School interview programs in the fall of 2002, the spring of 2003 and the fall of 2003," Cohen Decl. ¶ 13, and will seek to continue to demonstrate so long as the government forces Yale Law School to abandon its nondiscrimination policy. Hanna Decl. ¶ 12 ("SAME's planned activities include protesting military participation in Yale Law School interview programs."). Given the vague statutory language and the continuing interest of students to exercise their free speech rights, *amici* face a one-two punch in that the Solomon Amendment both fails to provide sufficient notice of the conduct it forbids and also establishes guidelines for application that encourage arbitrary and discriminatory enforcement. Can students protest? What if universities let students protest? What if the schools do not let students protest, but the students protest anyway? What if a university itself speaks out against the law?[8] *See, e.g.*, H.R. Rep. 108-443, pt. 1, at 17

[8] Indeed, the Third Circuit determined that "the Solomon Amendment, as recently amended, does not appear to permit law schools to disclaim the military's message." *FAIR*, 390 F.3d at 240. The Third Circuit reasoned that because of the requirement of access "equal in quality and scope" to that provided nondiscriminatory employers, "[a]s the law schools do not disclaim the messages of those employers, similarly they may not disclaim the message of the military." *Id.* at 240-41.

(noting that a DOD determination that a school is not in compliance with the law "will involve murky comparisons of the totality of the conditions for access . . . [which] may involve some factors beyond the control of the educational institution, for example, the actions of protestors") (Rep. Jim Marshall). The Solomon Amendment affords no solace to a student protester (nor a school administrator) that her exercise of her free speech rights will not endanger an entire institution's federal funding, a concern exacerbated by the fact that the Secretary of Defense acts as "prosecutor, judge and jury" in making "equal access" determinations. H.R. Rep. No. 108-433, pt. 1, at 17. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion) (striking down for vagueness an anti-loitering law, where "it may authorize and even encourage arbitrary and discriminatory enforcement"). There is no way, then, that *amici* can be certain their behavior conforms to the nebulous dictates of the Solomon Amendment. Because laws cannot constitutionally require speakers like *amici* to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked," *Baggett*, 377 U.S. at 372-73 (citations omitted), the Solomon Amendment is unconstitutionally vague.

The Solomon Amendment leaves open the possibility that Yale University could lose its funding even as a result of the most benign statement against discrimination in the military or in favor of nondiscrimination at Yale Law School. For instance, Yale Law School students participating in the CDO interview program could wear rainbow ribbons as a sign of solidarity with their gay and lesbian classmates who are without the protection of the nondiscrimination policy. Millions of dollars in funding to Yale University would be lost if the Secretary of Defense found that other employers were not the objects of similar

protests, thereby rendering the military recruiters' access "unequal." Moreover, even if the DOD never denied funds on this basis, the damage to *amici's* First Amendment rights would already be done. *See NAACP v. Button*, 371 U.S. 415, 435 (1963) ("It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.").

Finally, the DOD has utilized its statutory discretion to its distinct advantage, threatening the withdrawal of funding of almost $300 million from Yale University without making an actual final determination. The military, after all, indicated to President Levin of Yale University in 2003 that "despite more than two years of correspondence, meetings, and negotiations, [it] still did not have enough information" to determine whether Yale Law School had complied with the Solomon Amendment. *See Burt*, 354 F. Supp. 2d at 170. A further exchange of detailed information resulted only in another year without a "determination." *Id.* The result has been to subject Yale Law School and the entire university to the whims of the DOD. The Constitution does not permit the military to dangle the Solomon Amendment like the sword of Damocles over Yale Law School to force both the school and its students into forms of speech and conduct with which the military agrees. This is the height of arbitrariness. Accordingly, the Court should declare the law unconstitutional.

CONCLUSION

As an expressive association, the Yale Law School community has made a commitment to equality for a long-persecuted minority. It has chosen to regulate its private, internal matters pursuant to this commitment, including banning the military, a discriminatory employer, from the

official, school-run recruiting program. And for this "expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values," *Texas v. Johnson*, 491 U.S. 397, 411 (1989), the government seeks to punish Yale Law School with the Solomon Amendment. But the "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). For the reasons stated above, *amici*, as members of the Yale Law School community and as speakers in their own right, respectfully ask the Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

CARMINE D. BOCCUZZI, JR.
Counsel of Record
CATHARINE M. CLARK
KYLE C. WONG
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000

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In the Supreme Court of the United States

DONALD H. RUMSFELD, *ET AL.*,
Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF TEXAS, ALABAMA, COLORADO, DELAWARE, FLORIDA, INDIANA, KANSAS, MICHIGAN, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

JOEL L. THOLLANDER
Assistant Solicitor General

ADAM W. ASTON
Assistant Solicitor General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

Counsel for Amici Curiae
[Additional counsel listed on inside cover]

TROY KING
Attorney General of Alabama

JOHN W. SUTHERS
Attorney General of Colorado

M. JANE BRADY
Attorney General of Delaware

CHARLES J. CHRIST, JR.
Attorney General of Florida

STEVE CARTER
Attorney General of Indiana

PHILL KLINE
Attorney General of Kansas

MICHAEL A. COX
Attorney General of Michigan

LAWRENCE E. LONG
Attorney General of South Dakota

MARK L. SHURTLEFF
Attorney General of Utah

DARRELL V. McGRAW, JR.
Attorney General of West Virginia

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Solomon Amendment's equal-access condition on federal funding likely violates the First Amendment to the Constitution.

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Petitioners. The *amici* States have a strong interest in the continuing vitality of our Nation's all-volunteer armed forces. The men and women of the armed forces risk their lives each day in service of our Nation, and all Americans have an interest in ensuring that our soldiers receive the very best education and training available. The *amici* States agree that "recruiting is the key" to maintaining a strong and effective military composed wholly of those who have chosen to serve their country, 142 CONG. REC. 16,860 (1996) (statement of Rep. Solomon), and they have an interest in seeing that Congress has no need to employ its more sweeping and intrusive powers of conscription in order to provide for our common defense. Because the Solomon Amendment facilitates the military's ability to recruit some of our nation's best and brightest young people to serve as lawyers in our armed forces, *see* 142 CONG. REC. 12,712 (1996) (statement of Rep. Goodlatte), the *amici* States have an interest in the statute, and urge the Court to uphold it.

The *amici* States additionally recognize the important role that National Guard units—also composed entirely of volunteers—play in each State. Any decision restricting the United States Military's ability to recruit on college and university campuses would have similar adverse consequences for National Guard units across our country. For this reason as well, the *amici* States urge the Court to uphold the Solomon Amendment.

The *amici* States also have an interest in the broader implications of the court of appeals's holding in this case that an equal-access condition on the receipt of higher-education funds likely violates the First Amendment rights of higher-education institutions. Many state laws link public funding with university decisions relating to, among other things, admissions, courses offered, course credits issued, accreditation, and recruitment. The *amici* States do not believe that such legislation should be subject

to strict scrutiny whenever an institution of higher education, as represented by self-selected members of its faculty, believes that the law at issue has an incidental effect on a message that the school or its faculty desires to communicate. The lower court's conclusion to the contrary could cast doubt on a variety of state laws regarding higher education, and the *amici* States ask the Court to reverse the court of appeals's judgment.

SUMMARY OF THE ARGUMENT

Pursuant to its power to raise and support armed forces for our common defense, *see* U.S. CONST. art. I, §8, cl.1, 12, Congress has provided institutions of higher education with a strong incentive to refrain from placing undue restrictions on the military's ability to recruit on campus, 10 U.S.C. §983(b). The Solomon Amendment places a simple condition on the receipt of certain federal funds provided by contract or grant to institutions of higher education: institutions choosing to receive the specified funds must provide military recruiters with access to their campuses and students on equal terms to the access they provide to any other employer. *Id.* No more is required.

Though it is framed as a condition on funding expenditures typical of legislation under the Spending Clause, the Solomon Amendment also falls well within Congress's constitutionally enumerated powers to raise and support our military. *See Forum For Academic & Institutional Rights* ("*FAIR*") *v. Rumsfeld*, 390 F.3d 219, 245 (CA3 2004), *cert. granted*, 125 S.Ct. 1977 (2005); *FAIR v. Rumsfeld*, 291 F.Supp.2d 269, 312 (D.N.J. 2003); U.S. CONST. art. I, §8, cl.1, 12. The only challenge before the Court concerns whether this equal-access condition on receipt of federal funds, passed pursuant to that unquestioned congressional power, likely infringes Respondents' speech-related First Amendment rights.

As a funding condition reaching only employment-related recruiting activity on our Nation's campuses, the Solomon Amendment should not be subject to strict scrutiny review. Conditions on the receipt of funds expended by federal or state governments threaten the free speech rights of funding recipients only when the conditions are "aimed at the suppression of dangerous ideas." *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983) (citation omitted); *Speiser v. Randall*, 357 U.S. 513, 519 (1958). The Solomon Amendment's sole purpose is to facilitate recruitment for our all-volunteer armed forces. It is not aimed at the suppression of any idea, dangerous or otherwise, and the record in this case demonstrates that it has not in fact led to the suppression of ideas. *FAIR*, 390 F.3d, at 235, 245; *FAIR*, 291 F.Supp.2d, at 282. Indeed, neither law school faculty members nor students are known for their inability or reluctance to express their views. And, on this record, the Solomon Amendment's funding condition does not infringe the free-speech rights of the complaining federal funding recipients.

Neither are the First Amendment's compelled-speech and expressive-association doctrines relevant here. Because the Solomon Amendment operates as a funding condition, and not as a direct mandate, it compels no speech whatsoever—funding recipients may choose to take the money, with its equal-access condition, or to decline the federal funds and conduct their career-services activities as they please. And with respect to funding recipients' expressive-association rights, the Solomon Amendment reaches only those recipients who have voluntarily associated with the government's educational-subsidy programs. Should an institution wish to send a clear and unequivocal message disassociating itself from the government and the government's military-employment policies, it need only decline the government's financial assistance for its educational enterprises.

Prudential considerations also counsel against affirming the court of appeals's judgment. Subjecting the Solomon Amendment to strict scrutiny under the First Amendment, as the court of appeals has done, could have far-reaching consequences for many state laws that affect university conduct. Such laws should not be subject to strict-scrutiny review under the First Amendment because, like the Solomon Amendment, they are not aimed at the suppression of dangerous ideas. The Court should reject the court of appeals's erroneous conclusion to the contrary.

ARGUMENT

I. SUBJECTING THE SOLOMON AMENDMENT'S EQUAL-ACCESS FUNDING CONDITION TO STRICT SCRUTINY COULD HAVE FAR-REACHING CONSEQUENCES FOR MANY STATE LAWS DESIGNED TO INFLUENCE UNIVERSITY CONDUCT.

The Solomon Amendment stands virtually alone in the importance of the national interest it addresses—the continuing vitality of our all-volunteer military forces, *see* 142 CONG. REC. 16,860 (1996) (statement of Rep. Solomon)—and in the explicit grant of power the Constitution provides to Congress to legislate on this issue, U.S. CONST. art. I, §8, cl.1, 12 ("The Congress shall have Power . . . To raise and support Armies . . . ."). As a law designed to influence the conduct of institutions of higher education, however, the Solomon Amendment is far from unique. Texas and the *amici* States have many laws affecting university conduct. The *amici* States share a concern that adoption of the court of appeals's approach—subjecting the Solomon Amendment's equal-access funding condition to strict-scrutiny review under the First Amendment to the Constitution—could encourage challenges to a variety of state laws relating to the operation of in-state institutions of higher education.

Under the Solomon Amendment, educational institutions choosing to receive certain federal funds must provide military

recruiters the same access that they provide to those recruiting for any other employer. 10 U.S.C. §983(b). Notwithstanding the fact that the Solomon Amendment applies only to those institutions of higher education voluntarily receiving federal funds, *and* the fact that it addresses only the career-services-related conduct of such institutions, the court of appeals subjected the funding condition to strict First Amendment scrutiny when it determined that the complaining institutions "believe [that] the message they choose to express is impaired by the Solomon Amendment." *FAIR*, 390 F.3d, at 235, 242.

The *amici* States have promulgated extensive legislation—often functioning as a condition on funding—affecting university decisions relating to, *inter alia*, admission, courses offered, course credits issued, recruitment, employment, and accreditation. Such legislation should not be subject to strict scrutiny whenever an institution of higher education, as represented by some collection of its faculty, believes that the law at issue has an incidental effect on a message that the school or its faculty desires to communicate. *See id.*

A. State Laws Impact University Admission.

Texas law places certain constraints on the admissions decisions made by those institutions of higher education supported by the public fisc. For example, publicly-funded universities cannot discriminate against those who have been home-schooled: "an institution of higher education must treat an applicant for admission to the institution as an undergraduate student who presents evidence that the person has successfully completed a nontraditional secondary education according to the same general standards as other applicants for undergraduate education who have graduated from a public high school." TEX. EDUC. CODE §51.9241(b). Home-schooled applicants cannot be required to obtain a GED or

to take any special examination in order to be admitted to a publicly-funded university. *Id.* §51.9241(c).

Other States have taken similar steps to ensure that institutions of higher education treat home-schooled students the same as those who attended a more traditional high school. *See, e.g.*, ARIZ. REV. STAT. §15-1626(A)(9) (regarding admission to state universities); *id.* §15-1646 (regarding access to university scholarships); N.M. STAT. ANN. §21-1-1 (regarding admission to state universities); S.C. CODE ANN. §59-149-50 (regarding state-funded scholarships). Similarly, Illinois law prohibits discrimination in its public universities' admissions processes against those enrolled in the State's charter high schools. 110 ILL. COMP. STAT. ANN. 205/9.07.

Public academic teaching institutions in Texas also may not admit an applicant on a state-funded athletic scholarship unless the applicant otherwise meets certain of the institution's minimum academic standards. TEX. EDUC. CODE §51.9245. And under Texas law, public academic teaching institutions must admit every applicant for admission who has graduated with a grade point average in the top ten percent of the student's high school graduating class. *Id.* §51.803(a).

Many more States have delegated some form of authority over the admissions policies of their public institutions of higher education to their respective State educational boards. *See, e.g.*, COLO. REV. STAT. ANN. §23-1-113(1)(a) (authorizing State commission to implement admissions standards); FLA. STAT. ANN. §1007.261 (setting minimum requirements for admission); IOWA CODE. ANN. §256.16 (providing State board with power to adopt admissions rules for those institutions providing practitioner preparation); KY. REV. STAT. ANN. §164.020(8) (authorizing State council to approve minimum qualifications for admission); MASS. GEN. LAWS ANN. ch. 75, §2 (making admissions standards subject to approval of State board); MO. ANN. STAT. §173.005(5)

(providing State board with power to establish admissions guidelines); OR. REV. STAT. §351.070 (3)(g) (authorizing State board to prescribe qualifications for admission); PA. CONS. STAT. ANN. tit. 24, §20-2006-A(a)(6) (providing State board with power to establish general policies for admission); WIS. STAT. ANN. §36.11(3) (same).

These laws relating to university admissions practices typically apply only to those institutions of higher education receiving state support—principally a state's public universities. To be sure, the relationship between a state and its public universities differs fundamentally from the relationship between the federal government and the public and private universities subject to the Solomon Amendment's equal-access funding condition. *See, e.g., Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976) (holding that Texas's public universities are State agencies); *see also* TEX. EDUC. CODE §61.003. But the court of appeals's opinion contains no limiting principle by which to distinguish between public and private universities receiving state funds. *See, e.g., FAIR*, 390 F.3d, at 225 (noting that virtually every law school has a similar policy governing the use of career-services facilities).

To the extent that the court of appeals's analysis locates the First Amendment rights at issue principally in an educational institution's faculty—as is implicit in the court of appeals's reliance upon the faculty-approved career-services policies at issue, *see id.*, at 224-25—public university faculties would likely have, if anything, fewer obstacles to making constitutional claims under the court of appeals's approach than their counterparts at private institutions of higher education. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822 (1995) (noting that a public university, as an instrumentality of the State, is bound by the First and Fourteenth Amendments); *Perry v. Sindermann*, 408 U.S. 593, 594, 597 (1972) (addressing First Amendment rights of a professor employed by a public junior college).

The court of appeals's holding that the Solomon Amendment likely infringes a law school's—or its faculty's—First Amendment rights to control access to its campus and students thus threatens to undermine these state laws relating to who should have access to a university's educational enterprise. If, for example, the faculty of a public institution of higher education decided that it did not wish to endorse or accommodate the message that completion of a home-school education is "equivalent to graduation from a public high school," *see* TEX. EDUC. CODE §51.9241(b), the Texas law requiring that institution to provide an equal opportunity for admission to the home-schooled student could be deemed subject to strict-scrutiny review under the court of appeals's analysis. *See FAIR*, 390 F.3d, at 235.

B. State Laws Impact University Courses and Credits.

State laws relating to classes offered and academic credits issued by institutions of higher education could also be threatened if the Court affirms the court of appeals's conclusion that the Solomon Amendment must be subjected to strict-scrutiny review under the First Amendment.

In Texas, "[e]very college and university receiving state support or state aid from public funds shall give a course of instruction in government or political science which includes consideration of the Constitution of the United States and the constitutions of the states, with special emphasis on that of Texas." TEX. EDUC. CODE §51.301(a). This course of instruction must have a credit value of at least six semester hours, and no college or university receiving state support may grant an undergraduate degree to a student until that student has received credit for such a course. *Id.* Similarly, no college or university receiving support from the State of Texas may grant an undergraduate degree to a student until that student has received six semester hours of credit for a course in American history. *Id.* §51.302.

Many States have similar laws requiring that specific courses be offered by in-state institutions of higher education. *See, e.g.*, ARK. CODE ANN. §6-61-105 (providing that no college or university may grant a baccalaureate degree to a student who has not passed a course in American history or government); COLO. REV. STAT. ANN. §22-1-109 (requiring that instruction in the United States Constitution continue in state colleges and universities); DEL. CODE ANN. tit. 14, §4103 (same); MO. ANN. STAT. §170.011 (requiring that instruction in the United States Constitution continue in all colleges and universities); NEV. REV. STAT. 394.150 (same); N.J. STAT. ANN. §18A:6-3 (providing that instruction in the United States Constitution shall continue in state colleges and universities); TENN. CODE ANN. §49-7-110 (providing that no college or university receiving state support may grant a baccalaureate degree to a student who has not passed a course American history); VA. CODE ANN. §23-130 (requiring the curriculum at Virginia Tech to include courses in agriculture, mechanic arts, and military tactics); VA. CODE ANN. §23-164.9 (requiring the curriculum at James Madison University to include courses in education).

Most of these state laws relating to courses offered and credits issued, like the Solomon Amendment, are applicable only to institutions of higher education that receive "state aid from public funds." TEX. EDUC. CODE §51.301(a); *see also, e.g.*, COLO. REV. STAT. ANN. §23-1-113.2; TENN. CODE ANN. §49-7-110. Some, however, apply without regard to state funding. *See, e.g.*, ARK. CODE ANN. §6-61-105; MO. STAT. ANN §170.011; NEV. REV. STAT. 394.150. If the Solomon Amendment's conditional requirement that universities provide their students with equal on-campus access to governmental recruiters is subjected to strict-scrutiny review, these requirements that universities provide their students with on-campus instruction in government-related topics might well also be required, upon a First Amendment challenge, to satisfy the strict-scrutiny standard.

C. State Laws Impact University Students' Selective Service Registration.

Texas law also conditions receipt of any form of financial assistance funded by state revenue, including student loans guaranteed by the State, on a student's registration with the selective service as required by federal law. TEX. EDUC. CODE §51.9095. A majority of the States have placed a similar restriction on the use of public-education funds.[1]

These conditions on the receipt of state educational funds are almost identical to those in the federal law that the Court upheld in *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 859 (1984). Although the federal law was challenged in that case principally as a violation of the Fifth Amendment, *see id.*, the Court gave no hint that the funding condition may have been infirm instead on free-speech grounds. To the contrary, the Court noted approvingly that this condition on receipt of federal funds earmarked for education was designed to "promote compliance with the draft registration requirement and fairness in the allocation of scarce federal resources." *Id.*, at 855-56.

1. *See, e.g.*, ALA. CODE §36-26-15.1(a)(2); ALASKA STAT. §14.43.125; ARIZ. REV. STAT. §15-1841(A); ARK. CODE ANN. §6-80-102(c); CAL. EDUC. CODE §69400; COLO. REV. STAT. ANN. §23-5-118(1); DEL. CODE ANN. tit. 29, §6104; GA. CODE ANN. §20-3-519.1(2); IDAHO CODE §46-503(1); 105 ILL. COMP. STAT. 5/30-17.1; LA. REV. STAT. ANN. §17:3151; ME. REV. STAT. ANN. tit. 20-A, §12801; MISS. CODE ANN. §37-101-283; MO. ANN. STAT. §105.1213; MT. CODE ANN. §20-1-225; N.H. REV. STAT. ANN. §187-A:39; N.C. GEN. STAT. ANN. §143B-421.1(a)(2); N.D. CENT. CODE §15-10-36; OHIO REV. CODE ANN. §3345.32; S.D. CODIFIED LAWS §13-53-1.1; TENN. CODE ANN. §49-4-904(2); UTAH CODE ANN. §53B-11-104(1); VA. CODE ANN. §23-38.12; W. VA. CODE §15-1F-10; WIS. STAT. ANN. §36.11(27), 39.28(6).

If strict scrutiny is not the appropriate standard by which to review the federal selective service system's funding condition, neither should it be applied to state laws that condition receipt of public funds on registration with the selective service. Nor should it be applied to the Solomon Amendment. If the funding condition designed to facilitate the military's recruitment of students on campus is subject to strict-scrutiny review, however, *see FAIR*, 390 F.3d, at 234, 242, a subsequent challenge to the funding conditions designed to facilitate the military's possible conscription of students on campus, *see, e.g.*, TEX. EDUC. CODE §51.9095, could well also be subject to the same high standard of review.

D. State Laws Impact University Recruitment.

Many States also have laws relating to the recruitment of students both into and from institutions of higher education in certain circumstances. For example, in order to "provide adequate numbers of women and minority applicants for all positions" in the Texas Department of Transportation, the Department must "coordinate recruiting efforts with college placement officers and college student organizations" and "develop an extensive cooperative education program with colleges." TEX. TRANSP. CODE §201.403(a). There is no indication that the Department has met with resistance in its campus recruiting efforts, but if the need arose, the Texas Legislature should be free to condition future receipt of state funds on a university's continued cooperation with the Department of Transportation's on-campus recruiting efforts.

Texas has also established a "rural physician recruitment program," in which selected Texas medical schools receive funds collected by the State in return for developing programs designed to "recruit students from rural communities and encourage them to return to rural communities to practice medicine." TEX. GOV'T CODE §487.503(a). Similarly, the "medical and health care professions recruitment fund" is a special fund in the state treasury

designed to "support the recruitment of underrepresented ethnic minorities" into health-care-profession programs at institutions of higher education. TEX. EDUC. CODE §§51.711, .713. Programs eligible to receive these recruitment funds must be operated by accredited institutions of higher education and must agree to accept a substantial percentage of minority and women students. *Id.* §51.716(a).

Many States have analogous publicly funded recruitment programs. *See, e.g.*, ARK. CODE ANN. §6-81-1301 (university-assisted teacher-recruitment program); *id.* §21-3-501 (cooperative-education program designed to help recruit Arkansas college students into Arkansas government employment); CAL. EDUC. CODE §44393 ("paraprofessional" teacher-recruitment program); FLA. STAT. ANN. §1009.60 (program designed to recruit minority students for educational training and employment as public-school teachers); KY. REV. STAT. ANN. §161.165 (program for recruitment of minority teachers); MD. CODE ANN., HEALTH-GEN. §10-1502 (program for recruitment of early-childhood mental-health professionals); MISS. CODE ANN. §37-149-7 (program funding professional teacher recruiters who make oral presentations on all public-school campuses); MO. ANN. STAT. §168.430 (Teachers Corps program recruiting fifty college seniors annually with university assistance); OHIO REV. CODE ANN. §4701.26 (program funding education and recruitment of Certified Public Accountants); PA. CONS. STAT. ANN. tit. 24, §22-2211-A (program funding education and recruitment of health professionals practicing in-State).

These statutes demonstrate that Texas, and the other *amici* States, view recruitment into and from institutions of higher education—much like employment both inside and outside the university context—as an inherently commercial activity, rather than an inherently expressive one. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 640 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("Recruitment [is a] commercial activit[y], even when conducted for training rather than for profit."). The recruitment programs referenced here also reflect the States' view that there is nothing untoward in linking distribution of governmental funds with university decisions to facilitate the recruitment of students into particular professions. The Court should disavow the court of appeals's contrary holdings. *See FAIR*, 390 F.3d, at 235, 236 ("Recruiting is expression.").

E. State Laws Impact University Employment.

Institutions of higher education are also universally subject to state and federal laws prohibiting certain discriminatory employment practices. *See, e.g.* 42 U.S.C. 2000e *et seq.* ("Title VII"); TEX. LAB. CODE §21.051. Under state law, no university in Texas, whether private or public, can choose to take adverse action against an employee or a prospective employee "because of race, color, disability, religion, sex, national origin, or age." TEX. LAB. CODE §21.051; *see also id.* §21.002(8). Virtually every State has a comparable prohibition on discriminatory employment practices.[2]

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2. *See, e.g.* ALASKA STAT. §18.80.220; ARIZ. REV. STAT. §§41-1461 to -1465; ARK. CODE ANN. §§16-123-101 to -108; CAL. GOV'T CODE ANN. §§12900–12996; COLO. REV. STAT. ANN. §§24-34-401 to -406; CONN. GEN. STAT. §46a-99; DEL. CODE ANN. tit. 19, §§710–728; FLA. STAT. ANN. §§760.01–760.11; GA. CODE ANN. §§34-1-3, 34-5-1, 34-6A-4; HAW. REV. STAT. §§378-1 to -9; IDAHO CODE §§67-5901 to -5912; 775 ILL. COMP. STAT. 5/1-101 to 5/2-105; IND. CODE ANN. §§22-9-1-1 to -8-3; IOWA CODE ANN. §§216.1–216.20; KAN. STAT. ANN. §§44-1001 to -1044, 44-1111 to -1119; KY. REV. STAT. ANN. §§ 344.010–344.110; LA. REV. STAT. ANN. §§23:301 to :369; ME. REV. STAT. ANN. tit. 5, §§4551-4632; MASS. GEN. LAWS ANN. ch. 151B, §§1-10; MICH. COMP. LAWS ANN. §§37.2101–37.2804, 37.1101, 408.381; MINN. STAT. ANN. §§363.01–363.15; MO. ANN. STAT. §§213.010–213.137, 290.400–290.460, 209.162, 375.1306, 290.145; MT. CODE ANN. §§49-1-101 to -2-601; NEB. REV. STAT. ANN. §§48-1101 to -1126; NEV. REV. STAT. ANN. §§613.310–613.435; N.H. REV. STAT.

Although litigation concerning the Texas statute is not uncommon, to date there has been no suggestion that the statute might infringe upon a university's—or its faculty's—First Amendment rights of speech or expressive association. *See, e.g., Tex. A&M Univ., Corpus Christi v. Vanzante*, 159 S.W.3d 791 (Tex. App.—Corpus Christi 2005, no pet.); *Vincent v. W. Tex. State Univ.*, 895 S.W.2d 469, 472 (Tex. App.—Amarillo 1995, no writ). The Court should ensure that its decision in this case will not give rise to such challenges. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) (rejecting claim that application of Title VII in the university context violated the First Amendment).

F. State Laws Impact University Accreditation.

In order to "prevent deception of the public resulting from the conferring and use of fraudulent or substandard college and university degrees," TEX. EDUC. CODE §61.301, Texas also regulates the use of certain academic terminology by private institutions of higher education, *id.* A private institution may not officially call itself a "law school" or a "school of law," for example, until it has been issued a certificate of authority to do so by the Texas Higher Education Coordinating Board. *Id.* §61.313(a).

These regulations—designed to protect the public from the harms "degree mills" cause to prospective employers and to

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ANN. §§354-A:1 to -A:14; N.J. STAT. ANN. §§10:5-1 to :5-28; N.M. STAT. ANN. §§28-1-1 to -1-15; N.Y. EXEC. LAW §§290-301; N.D. CENT. CODE §§14-02.4-01 to -21; OHIO REV. CODE ANN. §§4112.01–4112.99; OKLA. STAT. ANN. tit. 25, §§1101–1706; OR. REV. STAT. §§659.010–659.115, 659.400–659.435, 659.990; PA. CONST. STAT. ANN. tit. 43, §§951-963; R.I. GEN. LAWS §§28-5-1 to -39; S.C. CODE ANN. §§1-13-10 to -110; S.D. CODIFIED LAWS §§20-13-1 to -56; TENN. CODE ANN. §§4-21-101 to -408; UTAH CODE ANN. §§34A-5-101 to -108; VT. STAT. ANN. tit. 21, §§495–495g; VA. CODE ANN. §2.2-2639; WASH. REV. CODE ANN. §§49.60.010 to .320; W. VA. CODE §§5-11-1 to -20; WIS. STAT. ANN. §§111.31-111.395; WYO. STAT. ANN. §§27-9-101 to -106.

legitimate institutions of higher education—come closer to regulating speech than any of the preceding statutory provisions. Even so, First Amendment challenges to the constitutionality of these accrediting regulations should properly be governed by the Court's commercial-speech cases, *see, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979), and not those applying a higher standard of review, *see, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Indeed, the federal government has recognized the importance of ensuring the quality of education received at degree-granting postsecondary institutions. Federal financial assistance in the form of Pell Grants and work-study programs, for example, is available only to students attending institutions that have been accredited by an agency recognized by the Department of Education. *See* 20 U.S.C. §§1070, 1091, 1094. Similarly, the States should be allowed to establish laws ensuring that those organizations within their borders that wish to hold themselves out as institutions of higher education provide an acceptable level of instruction. Those States which have chosen to do so, *see, e.g.* IOWA CODE ANN. §261.9; LA. REV. STAT. ANN. §17:1808; NEB. REV. STAT. §§85-1609, -1707; OKLA STAT. ANN. tit. 70, §4103; VA. CODE ANN. §23-276.3, have not thereby offended the First Amendment rights of any educational institution or its faculty.

Under the court of appeals's analysis of the Solomon Amendment's constitutionality, however, a school that has not met the Texas Higher Education Coordinating Board's standards for a certificate of authority might succeed in subjecting the accreditation process to strict scrutiny if individual faculty members can claim that requiring permission to use the term "law school" impairs a "message they choose to express." *See FAIR*, 390 F.3d, at 235.

Neither the Solomon Amendment, nor the many provisions linking state funding with regulation of university conduct, nor the statutes governing university employment and accreditation practices should be treated as laws directly "abridging the freedom of speech," U.S. CONST. amend. I, whenever an institution of higher education or individual faculty members can allege an incidental impact on the communication of a desired message. The *amici* States ask the Court to hold that the Solomon Amendment's equal-access funding condition should not be subjected to strict-scrutiny review under the First Amendment.

II. THE SOLOMON AMENDMENT IS A CONSTITUTIONAL EXERCISE OF CONGRESS'S POWER TO RAISE ARMED FORCES FOR OUR COMMON DEFENSE.

A. The Solomon Amendment's Funding Condition Does Not Violate the First Amendment Rights of Funding Recipients.

1. The Solomon Amendment's equal-access funding condition is not aimed at the suppression of ideas.

Texas and the *amici* States share a firm conviction in the real limitations on our federal government's power to regulate state action under the Spending Clause. *See, e.g., Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring in the judgment) (noting that there must be "some obvious, simple, and direct relation" between the condition and the expenditure of funds). The *amici* States agree with Petitioners, however, that explicit conditions placed on receipt of either federal or state funds will contravene the free-speech rights of prospective funding recipients only when the conditions are "aimed at the suppression of dangerous ideas." *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (citation omitted); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) ("Congress'[s] antecedent funding decision cannot be aimed at the suppression of ideas thought

inimical to the Government's own interest."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (noting that government may not aim at the suppression of dangerous ideas in the provision of subsidies); *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984) (holding ban on public broadcasters' editorializing designed "to curtail expression of a particular point of view on controversial issues of general interest" constitutionally infirm); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983) (stating that when governmental subsidies are not aimed at the suppression of dangerous ideas, the power to encourage actions deemed in the public interest is broad).

None of the state laws described above places conditions on a university's receipt of public funds in order to suppress free expression. *See, e.g.*, TEX. EDUC. CODE §§51.301, .716, .9095, .9241. Neither does the Solomon Amendment. The Solomon Amendment is designed to facilitate the federal government's recruitment of our all-volunteer armed forces, and it does so by imposing the modest requirement that those institutions of higher education choosing to receive specified federal funds must afford military recruiters the same access to campuses and students that such institutions afford to any other employer. 10 U.S.C. §983(b). The Solomon Amendment is thus aimed at conduct—career-services-related recruiting activity—and not the suppression of any idea, dangerous or not.

Institutions of higher education, along with their faculties and students, remain free to express disagreement with the military, its employment policies, and the federal government that has statutorily mandated the military's employment policies, *see* 10 U.S.C. §654. In fact, as both the district court and the court of appeals recognized, the Solomon Amendment has not suppressed expression critical of the military and its recruiting practices—if anything, the law has nurtured a good deal of such expression. *See FAIR*, 390 F.3d, at 245 ("The record is replete with references to

student protests and public condemnation."); *FAIR*, 291 F.Supp.2d, at 282. And should an institution of higher education so desire, in addition to expressing its vehement disagreement with the military's statutorily mandated employment practices, the university may also go further and deny the military on-campus recruitment opportunities—by declining to accept the government funding. *See Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984).

2. The Solomon Amendment's equal-access funding condition does not compel funding recipients' speech.

Notwithstanding the fact that the Solomon Amendment only places a reasonable and explicit condition on the deliberate choice to receive federal funds, the court of appeals erroneously concluded that its application to Respondents likely violates the compelled-speech doctrine. *FAIR*, 390 F.3d, at 236. The Solomon Amendment does not *require* higher education institutions to do anything. They are free to forgo federal funds and refuse the military recruiters access to their campuses. Thus, nothing is compelled. This fact sets the Solomon Amendment apart from the direct mandates at issue in the Court's compelled-speech cases. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 125 S.Ct. 2055 (2005) (compelled assessments for generic advertising of beef); *United States v. United Foods, Inc.*, 533 U.S. 405, 413-16 (2001) (compelled assessments for generic advertising of mushrooms); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 561 (1995) (state law requiring parade organizer to include a group displaying a message the organizer did not wish to include); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 6-7 (1986) (state commission's order requiring public utility to include another speaker's message in its billing envelopes); *Wooley v. Maynard*, 430 U.S. 705, 707 (1977) (state law requiring motorists to display state motto on license places); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (agency shop provision requiring public employees to pay a fee to support ideological speech of employee union).

3. The Solomon Amendment's equal-access funding condition does not violate funding recipients' expressive-association rights.

The court of appeals's conclusion that the Solomon Amendment impairs Respondents' expressive-association rights rests on the Court's recent decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *Dale* is distinguishable on several grounds.

Principally, unlike the direct regulation at issue in *Dale*, *see id.*, at 645, the Solomon Amendment functions as a condition on the receipt of funds, and so reaches only the conduct of those institutions that have expressly chosen to associate with the federal government. Any unwanted effect that the military's presence on campus may have on an educational institution's ability to advocate its viewpoint, *see id.*, at 650, can be cured simply by declining federal assistance for the institution's enterprise, *see Grove City Coll.*, 465 U.S., at 575.

Dale also involved the forced inclusion, as a *member*—indeed, as a *leader*—in the Boy Scout organization, of one whose presence was deemed to conflict with the organization's message. *See Dale*, 530 U.S., at 648, 650. Here, however, the military has only a temporary presence on the law-school campuses. Military recruiters do not become members of, nor are they even affiliated with, the law school, and thus they are not perceived to speak from within the organization. *Cf. id.*, at 655 (noting the message sent by "[t]he presence of . . . [a] gay rights activist in an assistant scoutmaster's uniform").

Also, the Boy Scouts caters to youth, many of whom are elementary-school children. Adults, on the other hand, comprise a law-school community. There is a far greater threat that a message

will be misconstrued, or missed altogether, when it is aimed at young children than when it is directed at adults, all of whom here possess, at a minimum, a college education. Just as the Court has recognized a significant distinction between young children and adults in determining what is permissible under the Establishment Clause, *compare Lee v. Weisman*, 505 U.S. 577, 592-94 (1992), *with Marsh v. Chambers*, 463 U.S. 783 (1983), this distinction should likewise matter when resolving whether a particular government action "affects in a significant way the group's ability to advocate public or private viewpoints," *Dale*, 530 U.S., at 648.

The court of appeals concluded that "the presence of military recruiters 'would, at the very least, force the law schools to send a message' . . . that the law schools 'accept' employment discrimination 'as a legitimate form of behavior.'" *FAIR*, 390 F.3d, at 232 (quoting *Dale*, 530 U.S., at 653). This ignores the key fact that it was Dale's "presence *in* the Boy Scouts," *Dale*, 530 U.S., at 653 (emphasis added), that threatened to send the unwanted message, and that a temporary visitor to campus, when he or she speaks, is not customarily viewed as speaking on behalf of the university. *See FAIR*, 291 F.Supp.2d, at 304-05 (recognizing the critical difference between a leader in the organization and an "unwanted periodic visitor"). Although military recruiters may well articulate a message the complaining law schools disagree with, no educational institution is hindered in its ability to articulate on its own behalf. Institutions of higher education remain free to advocate against the military's mandated employment policies, and they may do so—and have done so robustly—before, during, and after the military recruiters' on-campus visits. *See, e.g., FAIR*, 291 F. Supp.2d, at 282. Thus, the temporary presence of military recruiters does not have a meaningful effect on a law school's ability to articulate its view as required for a successful constitutional challenge under *Dale*. *See* 530 U.S., at 648.

B. The Solomon Amendment Rests on Congress's Broad Power to Raise and Support Armies.

The *Amici* States have a particular interest in the Court's resolution of this case to the extent that the Court's treatment of the Solomon Amendment may impact the many state laws linking expenditure of public funds with regulation of university conduct. But the *amici* States also encourage the Court to recognize—as the court of appeals almost entirely failed to do—the explicit constitutional provision upon which the Solomon Amendment is based, and which sets it apart from so much state and federal legislation: Congress has been expressly entrusted with the power, and the attendant duty, to raise and support armed forces for our common defense. U.S. CONST. art. I, §8, cl.1, 12 ("The Congress shall have Power . . . To raise and support Armies . . . ."); *see also id.*, cl.1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence . . . of the United States . . . ."); *id.*, cl.1, 13 ("The Congress shall have Power . . . To provide and maintain a Navy . . . ."); *id.*, cl.1, 14 ("The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . . .").

The constitutional power to raise and support armies, and to enact legislation necessary and proper to that end, "is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Indeed, the Court has confirmed that pursuant to this power, Congress may constitutionally conscript individuals for military service, notwithstanding the "vital interference with the life, liberty and property of the individual" that conscription represents. *Lichter v. United States*, 334 U.S. 742, 756 (1948). And the power to conscript is not limited to individuals: congressional "power to draft business organizations to support the fighting men who risk their lives can be no less." *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 305 (1942).

If the constitutional power to raise and support armed forces for our common defense includes the power to forcibly press both individuals and organizations directly into military service, it surely includes the lesser power to prohibit individuals and organizations from acting to interfere with the military's efforts to recruit those who might voluntarily choose to serve their country. *See, e.g., O'Brien*, 391 U.S., at 382. But the Solomon Amendment does not even do that: it simply requires that those who willingly accept federal funding for their educational enterprises must provide federal military recruiters access to their campuses and students that is equal to the access provided to any other employer. Under the Court's holdings in *Lichter*, 334 U.S., at 756, *Bethlehem Steel Corp.*, 315 U.S. at 305, and *Selective Draft Law Cases*, 245 U.S. 366 (1918), the Solomon Amendment, at least as applied to the private individuals and institutions bringing this suit, is, *a fortiori*, entirely constitutional.

And indeed, providing the military with an equal opportunity to recruit those who will make the voluntary choice to enlist helps to ensure that Congress will have no need to exercise its far more sweeping and intrusive power of conscription for military service. To that end, the *amici* States urge the Court not to second-guess the congressional judgment that the strength of our Nation's all-volunteer military "can only be maintained with effective and uninhibited recruitment programs," and that the success of such programs "relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to [that of] other employers." H.R. REP. No. 108-443, Pt. 1, at 3-4 (2004).

The Solomon Amendment is a necessary tool designed to ensure the continuing vitality of our all-volunteer armed forces. It ensures that the best and the brightest men and women remain available in our Nation's service. Its equal-access funding

condition does not violate the First Amendment rights of funding recipients, and so the Court should uphold this vital statute.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General
for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

JOEL L. THOLLANDER
Assistant Solicitor General

ADAM W. ASTON
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

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Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

DONALD RUMSFELD, *ET AL.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS

WARRINGTON S. PARKER, III
PETER E. GRATZINGER

HELLER EHRMAN LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

E. JOSHUA ROSENKRANZ*
SHARON E. FRASE
JEAN-DAVID BARNEA
ALIYA HAIDER

HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 832-8300

* *Counsel of Record*

September 21, 2005

QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. § 983, requires law schools to distribute and post military recruiting literature, to invite military recruiters to school-sponsored forums, and to coordinate student interviews, on pain of a university-wide withdrawal of federal funding. This command conflicts with law schools' longstanding and evenhanded policies of refusing to assist employers that invidiously discriminate against their students. Was the court of appeals correct that the Solomon Amendment unconstitutionally conditions funds on schools' relinquishment of their First Amendment rights?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners are U.S. Secretary of Defense Donald H. Rumsfeld; U.S. Secretary of Education Margaret Spellings; U.S. Secretary of Labor Elaine Chao; U.S. Secretary of Health and Human Services Michael O. Leavitt; U.S. Secretary of Transportation Norman Y. Mineta; and U.S. Secretary of Homeland Security Michael Chertoff, all in their official capacities.

Respondents are the Forum for Academic and Institutional Rights, Inc. ("FAIR"); the Society of American Law Teachers, Inc.; the Coalition for Equality; the Rutgers Gay and Lesbian Caucus; Pam Nickisher; Leslie Fischer; Michael Blauschild; Erwin Chemerinsky; and Sylvia Law.

Pursuant to Rule 29.6 of this Court's rules, respondents incorporate by reference the disclosure statement in their opposition to the petition for writ of certiorari.

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BRIEF FOR THE RESPONDENTS

INTRODUCTION

Law schools have long expressed the view that discrimination is morally wrong and fundamentally incompatible with the values of the legal profession. They have consistently expressed that view by word and by deed. If an employer intends to discriminate against a school's students on the basis of race, gender, or any other characteristic that is unrelated to merit, the school will not offer the employer affirmative assistance in recruiting.

By extending their antidiscrimination policies to sexual orientation, law faculties have taken a stand on one of the most divisive moral issues of our time. Through these policies, law schools protest sexual-orientation discrimination directed at their students and teach the leaders of tomorrow that it is wrong to abet invidious discrimination of any sort.

When law schools' antidiscrimination policies clashed with the military's discrimination on the basis of sexual orientation, Congress passed the Solomon Amendment, which punishes the entire university with the loss of virtually all federal funds if any department adheres to such a policy. In its current form, the Solomon Amendment requires law schools to provide not merely "access to campuses" and "access to students ... on campuses," but much more. 10 U.S.C. § 983(b)(1). Law schools must furnish affirmative assistance "in a manner that is at least equal in quality and scope to the access ... that is provided to any other employer." *Id.* That means the school must disseminate the military's recruiting brochures, post its bulletins, make appointments with students, and reserve spots for the military in its private forums for exchange of information, on pain of losing virtually all federal contracts or grants. In some schools hundreds of millions of dollars are at stake, for

projects as diverse (and unrelated to military recruiting) as cancer research, particle accelerators, and investigations into the promise of school voucher programs.

As much as the government tries to portray its position as a plea for equal treatment, it is nothing of the sort. It is a demand for exceptional treatment—a demand to be the only discriminatory employer that a law school will assist. It is, moreover, not just a demand that law schools stay neutral with regard to the government policy they protest, and just suffer military recruiters in their own forums. Nor is it just a demand that they lend military recruiters some assistance. It is a demand that a law school accord the military "most-favored-recruiter" status, even as the recruiters discriminate against the school's own students.

Congress could not directly command that private institutions disseminate or host the military's message, that schools suspend their antidiscrimination policies, or that they collaborate with another enterprise in an advocacy cause they consider immoral. Congress cannot achieve the same ends by couching the penalty as a denial of the "benefit" of millions of dollars in unrelated funding.

STATEMENT

This case reaches the Court on undisputed facts. As the courts below noted, "the Government has not challenged or substantially supplemented Plaintiffs' factual assertions," P.A. 87a-88a, and did not "proffer a shred of evidence," P.A. 24a; *see* P.A. 45a & n.26.[1]

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[1] The joint appendix is cited as "J.A." and the appendix to the petition for certiorari is cited as "P.A." The government's merits brief in this Court is cited as "U.S. Br."; its petition for writ of certiorari is cited as "Pet'n"; and its brief in the court of appeals is cited as "U.S. CA Br." Amicus briefs are cited as "___ Br.," according to the name, or abbreviation, of the lead amicus.

Law Schools Refuse to Actively Assist Discrimination Against Their Own Students

Law schools are more than just vocational schools that teach students to draft briefs and close deals. J.A. 53. Law schools are, and define themselves as, normative institutions. They aspire to shape future lawyers who "can profoundly change our society, its mores and values," J.A. 54; *see* J.A. 66, 135, and who will urge their visions of justice on society at large, J.A. 228, 230. Law schools admonish their students that "issues of justice are at the core of [their] mission," and urge students "to accept the challenge of more clearly defining a just system." J.A. 194-95.

These principles animate the antidiscrimination policies adopted by the faculties of virtually every law school in the nation. P.A. 94a; *see* J.A. 251-52. The wording varies, but the content is the same:

> [The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation.... Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy.

J.A. 33-34 (internal quotation marks omitted); *see* P.A. 94a-95a.

Law schools are not unique in adopting antidiscrimination policies, but the feature of the policy that is central to this case is uncommon outside the legal academy: The law schools' commitment to resist discrimination is more than just a ban on discrimination on the part of faculty, admissions officers, and registrars. J.A. 57-58, 196. The commitment extends to a refusal to actively

assist others who discriminate against the school's own students. As law schools see it, affirmatively assisting the discrimination of others is immoral. J.A. 196-97, 235-36. The prevailing view is that "if the Law School [is] going to operate a Placement Office, it must take responsibility for discrimination that occur[s] under its auspices.... This [is] an obligation of community," not some matter "external to the school." J.A. 70.

It goes without saying that a major purpose of this extension is to protect students from being victims of discrimination on campus. But as the district court found, and the court of appeals underscored, the policies also "serve both pedagogical and instrumental purposes by teaching values students would not otherwise learn from case books and by fostering an environment of free and open discourse." P.A. 95a; *see* P.A. 18a; J.A. 71-73 (describing the impact that Yale Law School's extension of protection to sexual orientation had on discourse and scholarship). At the same time, "the policies have also placed modest pressures on employers to re-think the stereotypical notions that underlie prejudice and discrimination." J.A. 228.

These were the motives behind law schools' decisions to add sexual orientation to their list of protected classes, beginning in the 1970s. P.A. 94a; *see* J.A. 69-71, 151-52, 211. By 1990, the trend was so pervasive, and the principle so fundamental, that the Association of American Law Schools ("AALS") voted unanimously to endorse this extension. *See* P.A. 95a. Virtually every law school in the country that had not already extended its antidiscrimination policy to cover sexual orientation followed suit. *Id.*; *see* J.A. 215, 251-52.

Law Schools Apply Antidiscrimination Policies to All Recruiters

For employers that agree to judge law students on their own merits, career services personnel offer a range of

services: They distribute the employer's leaflets into student mailboxes; maintain the employer's literature in binders; post the employer's announcements on bulletin boards; send emails to students about the employer's imminent arrival; publish the employer's précis in printed catalogs; make appointments for the employer with interested students; and invite the employer to private forums for the exchange of information between employers and students. J.A. 34, 94, 169-70, 171, 268-69. *See generally* NALP Br. at 9-16 (cataloging numerous sorts of assistance). But law schools will not provide these communicative services to any employer with an avowed racist or sexist hiring policy—or to any employer that discriminates on any other basis that the law school considers invidious. *E.g.*, J.A. 33-34, 235-36.

The military has an explicit policy of discriminating on the basis of sexual orientation. *See* 10 U.S.C. § 654(b). Because of this policy, the military's Judge Advocate General ("JAG") Corps are unable to supply the requisite certification that they do not discriminate. Law schools have historically refused to make an exception for any employer with a discriminatory policy. J.A. 77-78, 152-53. And they refused to make exceptions for the military.

The vast majority of law schools did not, however, apply their policies to bar military recruiters from the campus entirely; for the most part, as the AALS policy permitted, J.A. 252, they allowed military recruiters to recruit on campus on their own initiative or at the invitation of student groups. *E.g.*, J.A. 59-60, 114, 137-38. Law schools merely declined to offer JAG recruiters affirmative assistance.

The Solomon Amendment Compels Schools to Disseminate and Facilitate Military Recruiting Messages

The federal government demands an exemption that no other employer enjoys. The demand comes in the form of the Solomon Amendment, named for its original sponsor, Representative Gerald Solomon of New York. First passed

in 1994, and reenacted in progressively harsher and more intrusive permutations, the current version of the Solomon Amendment provides that an entire university loses virtually all federal funds if the "institution (or any subelement of that institution) has a policy or practice ... that either prohibits, or in effect prevents" military recruiters "from gaining access to campuses, or access to students ... on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer ...." 10 U.S.C. § 983(b). The breadth of the current version manifests itself along two dimensions: (1) the accommodations demanded, and (2) the penalty imposed.

To take the latter dimension first, the penalty for violating the Solomon Amendment is a cutoff not just of grants and contracts administered by the Department of Defense ("DOD"), but of virtually any federal grant or contract available to academic institutions, including funds administered under the umbrella of the Departments of Health and Human Services, Education, Labor, Transportation, and Homeland Security, and the scores of agencies within their domains, such as the Centers for Disease Control and Prevention, the National Institutes of Health, and the Food and Drug Administration, to name a few. *Id.* § 983(d)(1).[2] Moreover, if a law school declines to offer the requisite support to military recruiters, the federal government cuts off not just the law school's funds, but all federal grants and contracts directed to any branch of the university. For some academic institutions, the penalty for violating the Solomon Amendment is in the hundreds of millions of dollars. *See, e.g.*, J.A. 85 (over $300 million for Yale), 147 (same for Harvard), 163 ($130 million for New York University).

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[2] The only notable exception is funding for student financial aid. *See* 10 U.S.C. § 983(d)(2).

As to the accommodation demanded: The current Solomon Amendment, codifying the most-favored-recruiter principle the military adopted four years ago, requires more than just "entry to campuses" and more than just "access to students." In demanding "access to students ... that is at least equal in quality and scope to the access ... that is provided to any other employer," 10 U.S.C. § 983(b)(1), Congress codified a requirement that law schools offer military recruiters affirmative assistance in disseminating their recruiting messages. If a law school posts announcements, disseminates literature, makes appointments, prints information in a catalog, or sends emails for any employer—as every law school does—the law commands it to do the same for military recruiters. If a law school hosts any sort of job fair or any other job-related forum, it must invite military recruiters.

A couple of examples illustrate how the most-favored-recruiter principle operates in practice. Yale Law School was typical in the access and assistance it offered the military. Military recruiters were welcome to arrange to visit the Yale campus anytime and were free to borrow a classroom at the law school for informational presentations. J.A. 113-14. Any student could reserve any available location in a law school building to interview with military recruiters. J.A. 110, 114. Armed with the student contact information that Yale was statutorily required to provide, *see* 10 U.S.C. § 983(b)(2), recruiters could contact students directly. J.A. 79. At a military recruiter's request, Yale would even facilitate interviews with law students, by providing Yale personnel to coordinate the scheduling of interviews in a reserved room on campus. J.A. 114.

The military declared these accommodations a violation of the most-favored-recruiter requirement, mainly because the law faculty continued to adhere to a single expression of its antidiscrimination policy, an expression that had no effect on recruiting: The Yale personnel who would schedule the

interviews would be from *Yale College* (whose antidiscrimination policy, like the typical non–law school policy, did not extend to employers) and not from the *law school*. J.A. 83-84, 122, 133. At stake, the Army threatened, was $300 million in funds headed toward the medical school, the physics department, and other schools across the university. J.A. 85-86, 108. Yale relented. JAG Corps recruiters from each of four branches descended on Yale's campus and sat in empty interview rooms. J.A. 90.

The University of Southern California Law School, for its part, invited military recruiters to interview at the ROTC offices *on campus*. J.A. 59. USC helped schedule interviews for military recruiters; announced the military recruiting efforts in its weekly career-services newsletter; disseminated the military's literature to students; and supplied military recruiters with the same information as all other employers. *Id.* The Air Force declared that these accommodations, too, violated the most-favored-recruiter principle, because USC did not invite military recruiters to a school-sponsored forum—*off-campus*. J.A. 59-61; *see* P.A. 102a. Millions in university funds were at stake. J.A. 64. USC gave in.

These are not isolated anecdotes. Under the most-favored-recruiter principle, the military has routinely threatened law schools for any gesture of protest that treats military recruiters differently, even if the difference could have no material effect on recruiting efforts. The military threatened Harvard, for example, when it allowed military recruiters *on campus*, to recruit at the Harvard Law School Veterans Association, but would not volunteer its placement personnel to arrange the interviews. J.A. 137-38; *see also* J.A. 181. Boston College drew the military's ire when its law school allowed military recruiters *on campus* to interview, but maintained the military's recruiting literature in the library rather than in the career services office. J.A. 219; *see also* J.A. 154-55.

The Solomon Amendment's Origins

The Solomon Amendment chronology reveals that the measure has never been aimed at ensuring the success of military recruiting efforts. Congress did nothing about law school antidiscrimination policies until 1994, some 16 years after the first law school applied its antidiscrimination policy to sexual orientation and years after the policy proliferated. Congress was spurred to action by members who condemned what co-sponsor Representative Richard Pombo described as "nothing less than a backhanded slap at the honor and dignity of service in our Nation's Armed Forces." 140 Cong. Rec. 11,441 (1994). He inveighed against "policies of ambivalence or hostility towards our Nation's armed services" on the part of "[s]ome institutions of higher education in this country." *Id.* He threatened:

> These colleges and universities need to know that their starry-eyed idealism comes with a price. If they are too good—or too righteous—to treat our Nation's military with the respect it deserves[,] ... then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America.

Id. Representative Solomon echoed these sentiments when he introduced the law, declaring the intention to:

> tell[] recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment right[]. But do not expect Federal dollars to support your interference with our military recruiters.

Id. at 11,439. The sponsors urged their colleagues "to support the Solomon amendment, and send a message over the wall of the ivory tower of higher education." *Id.* at 11,441 (Rep. Pombo).

Sending the message was Congress' preeminent concern. Congress held no hearings and gathered no evidence about the actual effect of antidiscrimination policies on recruiting. DOD, for its part, actively opposed the Solomon Amendment, which it dismissed as "'unnecessary'" and "'duplicative.'" P.A. 5a-6a (quoting 140 Cong. Rec. 11,440 (Rep. Underwood)). In fact, a similar discretionary statute was already in effect, but pervasive antidiscrimination policies had had so little impact on military recruiting that DOD had rarely invoked the power to force its way onto campuses. *See* 140 Cong. Rec. 11,440. Congress overrode the military's needs assessment.

The first incarnation was limited to punishing those few schools that barred military recruiters at the campus gates. *See id.* at 11,438 (Rep. Solomon). Specifically, it denied funds only to an "institution of higher education that has a policy of *denying*, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes ... *entry to campuses* or access to students on campuses." National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994) (emphasis added). It did not require a school to provide any affirmative assistance to military recruiters, much less most-favored-recruiter assistance.

The penalty in the original version, too, was more modest: It applied only to DOD funds. Moreover, under DOD's interpretation, the penalty was imposed only on the particular school, or "subordinate element[]," within the larger university, that declined to assist the military. 48 C.F.R. § 209.470-1(c) (1996). If a law school violated the Solomon Amendment, the law school alone was punished.

Despite Recruiting Success, the Solomon Amendment Grows Harsher

Over the ensuing decade, both the penalty and the demand for assistance escalated. Beginning in 1997,

Congress applied the Solomon Amendment's penalty to a wider range of federal funds, to the point where, as we have seen, it now applies to virtually all funds or contracts that can be directed toward an academic institution. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, div. A, § 101(e), sec. 514(b), 110 Stat. 3009, 3009-271 (1996). At the same time, Congress adopted the current "subelement" language, which penalizes all schools within a university for the acts of any autonomous faculty group. *Id.* sec. 514(f), 110 Stat. at 3009-271.

As the penalties toughened, most law schools found ways to accommodate military recruiters even while reaffirming their opposition to invidious discrimination by withholding from military recruiters some of the services they offered employers that did not discriminate. *See* P.A. 99a; J.A. 155, 184-85, 241. The disparity in services did not undermine recruiting efforts. Competition for legal jobs in the military remained so intense that recruiters routinely noted that even "very qualified applicants will not be selected for a position," P.A. 100a (quoting J.A. 156, 169); *see* J.A. 60. There is not "a shred of evidence" in the record that the military was having difficulty filling JAG ranks with superlative officers before Congress passed the Solomon Amendment or before each successive iteration of the law, much less that any shortfall was attributable to law school antidiscrimination policies. P.A. 24a. The record shows a glut of highly qualified applicants. *E.g.*, J.A. 60, 161, 165.

Despite its successes in recruiting lawyers, in the wake of the September 11 attacks, the military executed an about-face. P.A. 100a. In December 2001, DOD sent dozens of letters to law schools threatening them to stop treating the military differently. *E.g.*, J.A. 61, 107-08, 147. The letters declared that each school was "inappropriately limit[ing]" military recruiting if it did not provide a "degree of access by military recruiters that is at least equal in quality and scope to that offered to other employers," even though the statutory

language, at the time, required no such thing. *E.g.*, J.A. 107-08; *see* J.A. 197-98, 220.

DOD broadcast that this unwritten policy change was not a matter of military need, but rather was motivated by the same indignation that had moved Congress seven years earlier. "[I]n today's military climate," said one DOD lawyer, "the Department of Defense ... 'doesn't want to play games' with the law schools." J.A. 63. A top DOD official explained that application of an antidiscrimination policy to the military is objectionable, because it "sends the message that employment in the Armed Forces ... is less honorable or desirable than employment with ... other organizations." J.A. 132. The Air Force's chief JAG recruiter conveyed the same theme in response to a letter from a law dean advising that AALS policy called for the school to take "ameliorative action ... includ[ing] programs, teach-ins and demonstrations critical of the military[,] ... accompanied by posters ... and buttons worn by ... faculty, also critical of the military hiring practices." J.A. 185. The chief recruiter's answer was that even these "ameliorative actions ... would be contrary to requirements of law," if the military concluded they "intimidate interested students." J.A. 187.

It was the demand for affirmative assistance, and especially the most-favored-recruiter principle, that triggered this lawsuit. When the district court in this case suggested a view that DOD's demand for affirmative assistance was unjustified by the statutory language, *see* P.A. 180a, Congress responded by amending the statute, this time to expand the substantive scope of the Solomon Amendment to reflect DOD's most-favored-recruiter interpretation, yielding the current language. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004).

None of the versions of the Solomon Amendment was accompanied by congressional findings justifying the intrusion. Congress never so much as held a hearing to

consider whether the military needed the Solomon Amendment, and the military never provided Congress with statistics supporting any such need.

One of the House Armed Services Committee reports on the 2004 amendment, for example, merely stated that the intended effect of the provision was (as the statute said) to provide military recruiters access to campuses and students that is equal in quality and scope to that provided other employers, without suggesting that the goal was driven by anything other than pique. H.R. Rep. No. 108-491, at 328 (2004). The only "evidence" offered in support of the amendment came in a letter to the committee from the Under Secretary of Defense for Personnel Readiness, who asserted that "some colleges and universities remain intransigent or outright opposed to compliance" with the Solomon Amendment's requirement that "military recruiters receive access to students." H.R. Rep. No. 108-443, pt. 1, at 7 (2004). By way of illustration, he offered a "particularly egregious" example, which was nothing but a failure to stifle student protest: He complained that "military recruiters and prospective recruits have been forced to endure verbal abuse and harassment," and "gauntlets of taunting fellow students and faculty impeding the path to designated interview rooms." *Id.* The letter contained no evidence as to the need for affirmative assistance, much less justifying the most-favored-recruiter principle. It declared only that "[u]nder normal circumstances, such intransigence and opposition to the established laws of the land would be unacceptable—but now, at a time when our nation is at war, this situation is intolerable." *Id.*

The Law Schools' Efforts to Respond

Forced to abandon their chosen method of teaching principles of antidiscrimination and of protesting employers that discriminate on any basis unrelated to merit, law schools have resorted to various alternative mechanisms of delivering their message—so-called "ameliorative"

measures. They have sponsored forums that they would not otherwise have sponsored, delivered speeches they would not otherwise have delivered, and posted announcements they would not have otherwise needed to post. *E.g.*, J.A. 141-43, 157-58, 222-23.

But these measures are no substitute for the message they were delivering by abiding by the antidiscrimination policies they promulgated. To the distress of law deans and faculties, members of their communities have concluded that the schools are not committed to antidiscrimination, and that the law schools have lost credibility to preach values of equality, justice, and human dignity. J.A. 231-32; *see* J.A. 40-41, 264-65.

The chilling effect within law school communities has been palpable. The shift in policy has made some students feel like second-class citizens, marginalizing them. J.A. 208-09, 213, 264-65. Discourse has suffered. J.A. 231-32; *see* J.A. 160. Faculty attest to student expressions of cynicism and cries of hypocrisy when the lessons turn to topics such as equality, human dignity, and other underpinnings of a just society. J.A. 231-32. They feel inhibited to preach about integrity, adhering to principle, and fighting for a worthy cause. *Id.*

The Preliminary Injunction Proceedings

Plaintiffs moved for a preliminary injunction on First Amendment grounds. In response, the government offered no evidence of military necessity. It offered no statistics to suggest that the military was having difficulty recruiting lawyers, no statistics to justify the military's insistence that schools offer affirmative assistance, and no evidence to suggest that other less intrusive recruiting devices could not be adapted to enhance recruiting. *See* P.A. 87a-88a.

The district court found that "[l]aw school recruiting policies have First Amendment value and the Solomon Amendment has an effect on Plaintiffs' First Amendment

interests." P.A. 138a. It also found that a law school's antidiscrimination policy is critical to its expressive mission. P.A. 144a-145a. But it denied a preliminary injunction mainly because it believed that the Solomon Amendment—which at the time did not include the requirement of affirmative assistance—"operates primarily to compel or limit conduct, not speech or expression." P.A. 84a.

The Court of Appeals Orders a Preliminary Injunction

The United States Court of Appeals for the Third Circuit reversed, ordering the district court to issue a preliminary injunction against enforcement of the Solomon Amendment. P.A. 48a. In an exhaustive opinion, the court of appeals held that the Solomon Amendment impermissibly compels a school to use its personnel and resources to propagate recruiting messages despite its objections to the military's exclusionary recruiting policies. P.A. 25a-40a. The nature of the assistance offered by schools, and the purpose of that assistance, the court of appeals held, were all laden with First Amendment expression. P.A. 34a-35a & n.19. The court also found that the Solomon Amendment burdens a school's right to expressive association by restricting its ability to teach its antidiscrimination commitment through a refusal to associate with employers that discriminate against qualified students on the basis of irrational stereotypes. P.A. 15a-25a.

In the face of these intrusions on constitutional rights, the court of appeals applied strict scrutiny. The court observed that the government had adduced "no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting," P.A. 45a, nor even "a shred of evidence that the Solomon Amendment materially enhances its stated goal." P.A. 24a. In fact, the court opined, there is ample reason to believe that the Solomon Amendment "actually impedes recruitment." *Id.* Moreover, the court held, "the Solomon Amendment could barely be tailored more broadly." P.A. 23a.

The court of appeals rejected the government's argument that the Solomon Amendment should be analyzed under the intermediate scrutiny analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), which applies to regulation of conduct with only an incidental impact on expression. P.A. 41a-43a. But the court also examined the statute under this lower standard, and concluded that the Solomon Amendment would fail that level of scrutiny as well. P.A. 43a-47a.

Judge Aldisert dissented. P.A. 48a-81a.

SUMMARY OF ARGUMENT

The military has a message when it recruits. Law schools have a message when they refuse to assist employers that discriminate against their own students. When Congress penalizes a law school for adhering to its message and refusing to assist military recruiters to disseminate theirs, it infringes three First Amendment freedoms—the right to be free from compelled speech; the right to speak; and the freedom to associate—all against the backdrop of an academy that enjoys heightened protection.

First, the Solomon Amendment requires law schools to give military recruiters more than just "access to campus" and more than just "access to students ... on campus." It requires schools to serve military recruiters affirmatively, with services that are "at least equal in quality and in scope" to the services that the school provides to employers that do not discriminate. Those services are communicative to the core: distributing, posting, and printing literature; making introductions; and sponsoring private forums for exchange of information. The doctrine of compelled speech prohibits government efforts to compel a private speaker to disseminate, carry, or host a message against its will.

Second, the Solomon Amendment requires law schools to suspend their antidiscrimination policies. These policies both protest discriminatory policies directed at the schools'

students and teach the lesson that assisting discrimination is immoral. The First Amendment protects a law school's interest not just in uttering the words, but in conveying the message as it chooses. A law school's choice to punctuate its message by refusing to assist discrimination deserves at least as much protection as a civil rights group's choice to punctuate its antidiscrimination protest by boycotting businesses that discriminate. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

Third, the Solomon Amendment requires law schools to collaborate with military recruiters in an effort—discriminatory recruiting—that the schools consider fundamentally unjust. This requirement violates the schools' freedom to associate, the right to choose for themselves which causes to assist or resist. The freedom of association is not limited to circumstances in which the government interferes with an organization's internal composition, but extends to the full range of causes an expressive organization may choose to embrace or to reject.

These three infringements are treated the same under the First Amendment whether Congress imposes them by command or by penalizing schools with a withdrawal of federal funds and contracts. This Court has maintained for half a century that: "To deny [a benefit] to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). The only exception to this rule—where the government has designed a specific program and is "simply insisting that public funds be spent for the purposes for which they were authorized," *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 211 (2003) (plurality)—has no bearing here. An entire university does not become a government mouthpiece—bound to carry the message of any government agency and suppress its own—just because a researcher or

department clear across campus has opted to accept federal funds or to provide a contractual service to the government.

The government cannot sustain its burden of justifying the Solomon Amendment's infringement on First Amendment rights. Strict scrutiny applies because the Solomon Amendment governs expression, both the government's expression and the school's expression, and because it is directed at promoting one viewpoint above all others. But the Solomon Amendment fails even under intermediate scrutiny. To be sure, military recruiting is a compelling interest. But the government has not demonstrated the necessary fit between the "disease sought to be cured" and the means it has chosen. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality) (internal quotation marks omitted). There is no evidence, and no reason to believe, that the government needs to demand any affirmative assistance from law schools in order to achieve its recruiting goals, and there is even less justification for Congress' insistence that a school must provide to military recruiters every single communications service it provides to some other employer, even if the denial of some service or another could have no bearing on recruiting success.

ARGUMENT

I. THE SOLOMON AMENDMENT INFRINGES UPON LAW SCHOOLS' EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

This case involves speakers on both sides.

Military recruiters are speakers. When military recruiters demand that schools assist them in recruiting, they are demanding assistance in disseminating their messages—requiring schools to disseminate and post recruiting literature, print the military's job listings, and invite military spokespersons to private forums for the exchange of

information. To be sure, their speech is directed toward a goal, to fill the ranks of the JAG Corps, but there is no denying that what they are doing, and seeking help in doing, is advocacy about the benefits of the JAG experience and the satisfaction of service to country.

The schools, too, are engaged in speech of their own. When a law school declares it will not assist a discriminatory employer—by disseminating or hosting its messages—it is, of course, protecting its own students against discrimination. But it is also taking a public stand against discrimination, and here, more specifically, protesting a governmental policy of discrimination directed against its students. And it is also teaching a lesson to its students and community. The lesson is not just about the injustice of discrimination, but also about the immorality of assisting others who discriminate.

Thus, when Congress fired its shot "over the wall of the ivory tower of higher education," 140 Cong. Rec. 11,441 (1994) (Rep. Pombo), it hit not one, but three distinct constitutional rights: the right to be free from compelled speech; the right to express a message in the most effective manner; and the freedom to associate. We address each in turn, below.

But first, a note about the backdrop of this First Amendment clash: That Congress chose the "ivory tower of higher education" as the battleground—and law schools in particular—is no small matter from a First Amendment perspective. "This Court has recognized that [First Amendment] right[s] [are] nowhere more vital than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (internal quotation marks omitted). The academy has traditionally been the launching pad for challenges to government orthodoxy, which is why the courts have routinely subjected infringements on speech and expressive association to especially heightened scrutiny in that context. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835-36 (1995); *Rust v. Sullivan*, 500

U.S. 173, 200 (1991); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The scrutiny should be all the more rigorous in the context of the legal academy, in light of the role lawyers have historically played in amplifying protests against government policies and advancing minority interests against politically entrenched majorities. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001); *NAACP v. Button*, 371 U.S. 415, 429-30 & n.12 (1963); *see also Grutter v. Bollinger*, 539 U.S. 306, 332-33 (2003) (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

The government might disagree with a law school's judgment—as it often does when it confronts acrid dissent. The government might believe that helping an employer that discriminates to disseminate its recruiting message will not undermine the school's protest or pedagogical designs too much, or that the academic environment is not unduly poisoned when the school affirmatively helps an outsider discriminate against its own students after vowing to establish the school as a discrimination-free zone. *See* U.S. Br. at 29, 31. But academic freedom means that the decision is the law school's to make, free from government interference. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." (citations omitted)). "A university ceases to be true to its own nature if it becomes the tool of ... [the] State ...." *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (internal quotation marks omitted). *See generally* Am. Ass'n of Univ. Professors (AAUP) Br. at 8-16 (discussing academic freedom ramifications of Solomon Amendment); Columbia Univ. Br. at 16-19.

Because of the academy's unique societal role, its First Amendment rights are arguably broader than the rights of

other sorts of private institutions. *See, e.g.*, *Rust*, 500 U.S. at 200. At a minimum, this much is clear: Whatever First Amendment protection the courts offer other expressive associations is especially heightened in the legal academy. The legal academy's agitation for change deserves at least as much protection in this simmering cultural battle as the efforts of Boy Scouts, veterans, or others bent on preserving the status quo.

A. The Solomon Amendment Infringes the Law Schools' Right to Be Free from Government-Compelled Speech.

1. *The Solomon Amendment Requires Law Schools to Disseminate, Facilitate, and Host Military Recruiting Messages.*

This is what the Solomon Amendment directs law schools to do for military recruiters: • *Disseminate our literature in student mailboxes.* • *Post our job announcements on your bulletin boards.* • *Maintain our leaflets in your binders for reference by students.* • *Publish our précis in your printed catalogs.* • *Email students about our imminent arrival.* • *Negotiate appointments for us with students.* • *Supply us with private meeting rooms for discussion with candidates.* • *Reserve for us spots at your private forums where we can post our "JAG Corps" banners and discuss career options with your students.* *See supra* at 4-5, 7-8; NALP Br. at 9-17 (describing varied modes of recruiting assistance).

Thus, what the government characterizes throughout its brief as "access to students" is nothing less than a demand that law schools distribute, post, print, email, negotiate, and otherwise provide forums for the speech of military recruiters. If a law school performs any of these communicative services for any employer—and they all do—it must provide the same communicative services for the military. The military is demanding "access" only in the

same sense that a writer seeks "access" to a newspaper's editorial page, a consumer advocate seeks "access" to a utility's billing envelope, or a propagandist seeks "access" to a private forum.

Compelling a law school to carry or host the government's recruiting message against its will is a violation of the doctrine of compelled speech. Just as the government may not compel a private company to disseminate an unwanted brochure in its billing envelopes, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12-17 (1986) (plurality), it cannot force a private university to disseminate military brochures. Just as the government may not force a motorist to display a four-word state motto on his license plate, *Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977), it cannot force a private institution to display the military's postings on its bulletin boards. Just as the government may not force a newspaper to publish specified opinion pieces, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974), it cannot force a school to print specified recruiting messages. Just as the government may not force a parade organizer to include an unwanted marching contingent bearing "a message it did not like," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 574-81 (1995), it cannot force a private forum to admit an unwanted contingent of recruiters to unfurl its banner at a private information fair.

The government concedes that recruiting is speech. *See* U.S. Br. at 13 (referring to "[t]he speech of the recruiters" as "the speech of the government"); *id.* at 28-29 (law schools "create an opportunity for an exchange of information between students and outside employers"). Specifically, as one amicus brief from military officials attests, recruiting is advocacy "to promote service in the nation's military and to present information about the ... benefits of such service." Abbot Br. at 21 n.14. The government concedes also that the Solomon Amendment's most-favored-recruiter principle

requires schools to use these various vehicles of communication to disseminate and host the government's recruiting message. U.S. Br. at 37. That should be the end of the inquiry under the compelled speech cases.

But the government tries to avoid this body of precedent by mischaracterizing, first, the theory of the claimed violation and, second, the compelled message the law schools are resisting.

As to the theory, the government frames it thus: "The court of appeals' compelled speech holding ultimately appears to rest on the notion that the First Amendment gives a property owner a right to exclude from its property anyone engaged in expressive advocacy," contrary to *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). U.S. Br. at 31. This characterization overlooks both the nature of the co-opted forum and the types of services demanded. *PruneYard* established only that a shopping mall cannot invite the general public onto its property and then assert a right to exclude invitees from engaging in any public speech at all, at least where the proprietors do not object in any way to the content of the messages disseminated. *See Pac. Gas & Elec.*, 475 U.S. at 12 & n.8 (distinguishing *PruneYard* on this basis). If the Solomon Amendment merely required a school to let student activists make unobjectionable speeches on campus, a citation to *PruneYard* would be a stretch, but a plausible one. But *PruneYard* does not come close to justifying a law that demands a school's active assistance in helping a specified outsider disseminate a specific message that is deeply objectionable to the institution.

As to the message resisted: Law schools resist being forced to disseminate and host the military's recruiting messages. In arguing that there is no infringement, the government says nothing about those compelled messages. The government pretends that the only message the schools resist is a message endorsing "Congress' policy on the service of homosexuals in the military," insisting, at every

turn, that there is no compelled speech violation so long as "the Solomon Amendment does not seek to induce a school 'personally to express' its agreement with that policy," U.S. Br. at 26; *see also id.* at 13, and "[t]he recruiters are ... not ... mak[ing] speeches in support of Congress's policy concerning service by homosexuals," *id.* at 27. This analysis is flawed both factually and legally.

As a matter of fact, while recruiters may not be expatiating about gays in the military, the record demonstrates that military recruiters do, indeed, find themselves advising students, "Son, you have no place in the JAG Corps because you are gay." *See* P.A. 32a; J.A. 39-40. And even when they do not say it explicitly, law schools are justified in perceiving that every time the military says, "Uncle Sam wants you," it carries with it the implicit caveat, "but not if you are gay." J.A. 236; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

Legally, the government's analysis conflates message with motive. The military's discriminatory policy is why law schools refuse to disseminate the military's message and to host military spokespersons. But, as the court of appeals understood, the main focus of this compelled speech claim is, necessarily, on the speech that is compelled, not on the schools' motive for resisting. *See* P.A. 33a. "*[W]hatever the reason*," the refusal to host or assist another speaker "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575 (emphasis added). That a law school's resistance is rooted in a longstanding and deep-seated principle—on a controversy that is riling the nation—only makes its interest that much weightier.

The government's conflation of message with motive seems to derive from an equally erroneous view that there is no compelled speech violation unless the host "'disagrees with'" the literal content of the message it is forced to host,

rather than having a bona fide basis for declining to disseminate it. *See* U.S. Br. at 26 (quoting *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060 (2005)). Under this view, a school that refuses to assist military recruiters out of a religiously based pacifism, *see* 10 U.S.C. § 983(c)(2), could be required to assist military recruiters so long as it is not compelled to utter, "War is good." It is enough, according to the government, that "[i]nstitutions need not utter any words of endorsement for that policy; nor must their representatives carry a sign expressing support for that policy." U.S. Br. at 13.

This, of course, has never been the law. This Court routinely allows speakers to resist a government-compelled message even though the speaker does not claim to disagree with the message's literal content, and, indeed, even when the precise content is not known at the time of the challenge. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977); *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). For that matter, the doctrine applies with full force not just to "compelled statements of opinion," but also to "compelled statements of 'fact,'" which is to say that the speaker cannot disagree with the statement, but simply prefers not to carry it. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). That is because a government command that a private party foster its (or anyone else's) message is a compelled speech violation, whether or not the unwilling host disagrees with the message.[3]

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[3] Contrary to the government's insinuation, *see, e.g.*, U.S. Br. at 25-26, 30 n.5, this Court did not silently overrule this line of cases when it distinguished "'compelled subsidy' cases" from "true 'compelled speech' cases," noting that the latter category includes cases "in which an individual is obliged personally to express a message he disagrees with." *Livestock Mktg.*, 125 S. Ct. at 2060. The Court there was addressing the consequences of the "compelled subsidy" label, and had no occasion and

2. *This Court Has Rejected Each of the Government's Efforts to Trivialize the Violation.*

The government offers several additional rationales to remove the Solomon Amendment from the ambit of the compelled speech doctrine. This Court has rejected each.

Endorsement. Forcing one speaker to carry another's message implicates the compelled speech doctrine even if most reasonable listeners would not be confused about the identity of the real speaker, and the "students or ... outside world" might not be tricked into believing "that law schools endorse the existing rules concerning service by homosexuals in the military." U.S. Br. at 29. These traits are common in compelled speech cases. There is never a danger that readers will think that a newspaper is endorsing an op-ed piece labeled as a counterpoint to the paper's own editorial. *See Tornillo*, 418 U.S. at 244, 256. There is no danger that the outside world would mistakenly believe that a motorist actually wants others to "Live Free or Die," just because his license plate says so. *See Wooley*, 430 U.S. at 720-22 (Rehnquist, J., dissenting). Yet, this Court concluded these speakers were entitled to resist disseminating those messages. *See also Pac. Gas & Elec.*, 475 U.S. at 15 n.11.

Freedom to protest, rebut, or disclaim. A dissenting motorist is, of course, free to cry out in protest or emblazon his car with a contrary message, "The state motto is bunk." *Cf. Wooley*, 430 U.S. at 707-08 & n.4. And a newspaper is free to emphasize its disclaimer in bold print. But this Court held in each instance that the option to ameliorate, protest, or disclaim does not cure a compelled speech violation. To the contrary, the ameliorative statements are but ripples of the compelled speech harm. Compelling one speaker to convey another's message is impermissible in part because the renitent host will often feel compelled to respond when he

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no need to redraw the traditional contours of the category of "true 'compelled speech' cases" it was distinguishing.

would otherwise "prefer to remain silent." *Pac. Gas & Elec.*, 475 U.S. at 18; *see Hurley*, 515 U.S. at 575-76.

By this principle, the government's observation that law schools "are free to criticize the military," U.S. Br. at 29, and "free to disavow" the military's message, *id.* at 31—and that they actually do engage in extensive "ameliorative" speech that they would not otherwise have undertaken, *id.* at 17—only underscores the constitutional violation. And as the AALS itself cogently explains, the ameliorative speech is, in any event, no substitute for the schools' chosen method of expression. *See* AALS Br. at 25-30. That said, as the court of appeals pointed out, the military has supplied every reason to expect that it will succumb to the temptation to invoke the Solomon Amendment to suppress "verbal abuse," H.R. Rep. No. 108-443, pt. 1, at 7, protests, or any other speech it thinks will suppress student interest in military jobs. P.A. 36a; J.A. 187-88; *see supra* at 12-13.

Communicative services to others. Nor is the violation tempered by the schools' willingness to supply to other employers the communicative services that they refuse to extend to military recruiters. The First Amendment has no volume discount. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 569-70. A private forum may "decide[] to exclude a message it d[oes] not like from the communication it cho[oses] to make." *Id.* at 574. Just as a newspaper or on-line service that publishes classified ads would have a right to exclude the government's recruiting ad, so, too, a school has the right to make the same editorial judgments as to which messages it will facilitate and which it will resist. In any of these contexts, the government's forced participation would interfere with the host's "autonomy over [its] message." *Id.* at 576; *see also Tornillo*, 418 U.S. at 258.

Only by ignoring every one of the 17 substantive declarations filed in this case could the government argue that "when engaged in the activities to which the Solomon Amendment is addressed, institutions are not involved in their own expressive enterprise, let alone in the editorial function of deciding what point of view to take." U.S. Br. at 29. It certainly is true that a school does not certify every employer for quality or moral purity. But, as every declarant confirms, law schools *are* expressing a message—one that is foundational to them—when they adopt antidiscrimination policies and enforce them evenhandedly against all employers. *E.g.*, J.A. 38, 57-58, 76-78, 152-54, 196, 227-30; *see infra* at 28-30. Along that metric, they exercise their editorial function vigilantly—much more vigilantly than the St. Patrick's Day parade organizers whose editorial control was upheld even though the organizers "had no written criteria and employed no particular procedures for admission, voted on new applications in batches, ... and did not generally inquire into the specific messages or views of each applicant." *Hurley*, 515 U.S. at 562 (internal quotation marks omitted). As *Hurley* confirms, the sponsors of a forum do not lose the freedom to screen speakers on a criterion that is important to them just because they decline to apply multiple other screens.

B. The Solomon Amendment Suppresses the Law Schools' Protest and Right to Teach Their Lesson in the Most Effective Way.

The academy is a normative institution. By adopting and living by an antidiscrimination policy, a law school instills a lesson in its students and its community: "We do not discriminate. We do not assist others who discriminate. No exceptions." From the law schools' perspective, the principle that it is immoral to *assist* discrimination is integral to the antidiscrimination lesson. *See* J.A. 38, 195-96, 213, 229-30. Beyond pedagogy, when a law school applies its antidiscrimination principles to the government, it is lodging

its protest against a government policy that is the focal point of a raging national debate.

That is not to say that the antidiscrimination policies serve *only* to teach and to protest. To be sure, law schools designed these policies *also* to protect students from the affront and injury of being victims of discrimination, at least within the confines of their own schools. J.A. 228. But that purpose does not detract from the additional communicative purposes that the record establishes.

When the Solomon Amendment forces a law school to help an employer that discriminates, it undermines not just the law school's interest in protecting students from discrimination, but also the lesson and the protest. A law school cannot effectively teach that it is immoral to assist discrimination when it affirmatively assists an employer that openly discriminates against the school's own students. To be sure, the law school can still *say*, "Thou shalt not assist discrimination." *See* U.S. Br. at 17. But in a law school, of all places, to preach the principle while defying the dictate teaches nothing but cynicism. *See* J.A. 229. At the same time, the government is squelching the law school's chosen means of protest—a limited sort of boycott of any institution that discriminates. One need not embrace the law school's view on the matter or consider the ultimate outcome of the national debate inevitable to recognize that the law school has a First Amendment interest not just in preaching and not just in protesting, but in doing both through the means it deems most effective. *See* Cato Inst. Br. at 1-4, 11-13.

That was the right this Court recognized in *NAACP v. Claiborne Hardware Co.*, when it held that an advocacy group was entitled not just to speak out in protest against an institution that discriminates, but to punctuate the message by refusing to support or assist the targeted institution. 458 U.S. 886, 907 (1982). There, community leaders organized a boycott of businesses that discriminated on the basis of race. *Id.* at 889. The Court held that the organizers had a

constitutional right to do "more than assemble peaceably and discuss among themselves their grievances against governmental and business policy." *Id.* at 909. Law schools, pressing their civil rights position, have at least as much freedom to refuse to assist or support entities that discriminate, especially when the discrimination would be perpetrated by the government itself, on the law school's own campus, under its own auspices, and against its own students.

C. The Solomon Amendment Infringes the Law Schools' Freedom Not to Associate with Military Recruiters in a Cause They Consider Unjust.

As the court of appeals recognized, the Solomon Amendment infringes the law schools' freedom of association, as well. P.A. 15a-25a. The court of appeals' analysis of the parallels between this case and *Boy Scouts of America, Inc. v. Dale*, 530 U.S. 640, is so thorough and persuasive that we will not burden the Court by repeating it here. Instead, we adopt that analysis, and embellish with two additional observations.

First, the Boy Scouts were hard-pressed to demonstrate that their aversion to homosexuality was integral to what they stood for as an organization. This Court ultimately deferred to the organization's assertion of its own mission, but it was by no means self-evident. *See id.* at 647; *id.* at 685-86 (Stevens, J., dissenting). In contrast, the ardent stance against discrimination—and specifically, the refusal to assist discriminatory employers—has been an explicit and earnest article of faith among law schools for decades.

More importantly, the scoutmaster in *Dale* was not using his affiliation within the Boy Scouts to express anything. He never discussed sex with the scouts within his troop, much less advocated homosexuality. *Id.* at 654-55; *see id.* at 689-90 (Stevens, J., dissenting). In contrast, here, military recruiters descend on campuses specifically to speak. And

they demand the schools' affirmative assistance to inflict on the schools' own students the very act—discriminatory hiring—that the law schools find so abhorrent.

The government's challenge to the court of appeals' analysis relies mainly on the assertion that two particular characteristics of the government action in *Dale* are "crucial" to establishing an expressive association violation: (1) the challenged law must "interfere[] with an expressive organization's interest in determining its own internal composition"; and (2) the government must "force[] an expressive organization to communicate a message that [is] contrary to its beliefs." U.S. Br. at 19. "Because the Solomon Amendment does neither," the government asserts, "it does not implicate the First Amendment right to associate." *Id.* at 23. Beyond those two contentions, the government analogizes the Solomon Amendment to antidiscrimination laws this Court has upheld. *See id.* at 24-25. All three arguments fail.

Internal composition. Far from suggesting that the government is free to compel association in any way, so long as it does not interfere with an organization's "internal composition," *Dale* recognized the opposite: "Government actions that may unconstitutionally burden this freedom [of expressive association] *may take many forms*." *Dale*, 530 U.S. at 648 (emphasis added).

This reference underscored the point the government now elides: *Dale* is not the only freedom-of-association case this Court has confronted. *Dale* emerged against a backdrop of almost half a century of precedent prohibiting the government from interfering with associational rights in a variety of ways. The government may not burden an organization's choice of strategic alliances. *See Button*, 371 U.S. at 437-39 (lawyers); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (paid political advocates). The government may not demand that an institution ally itself with the government's favored political cause. *See O'Hare Truck Serv., Inc. v. City*

of Northlake, 518 U.S. 712, 720-26 (1996); *Elrod v. Burns*, 427 U.S. 347, 360-72 (1976) (plurality). The government may not even intrude on an institution's decision whether (or not) to lend financial support to a political cause. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-88 (1978); *Abood*, 431 U.S. at 233-36. This Court has disapproved of even the most indirect burdens, not just on membership, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (disclosure of membership lists), but on other sorts of affiliation as well, *see Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-93 (1982) (disclosure of donors to unpopular party); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960) (disclosure of organizations contributed to).

In each of these contexts, the government is constrained because these sorts of intrusions undermine the ultimate purpose of associating in the first place: "[e]ffective advocacy of both public and private points of view, particularly controversial ones." *Patterson*, 357 U.S. at 460. The government infringes this freedom when it dictates to a normative institution (a law school) that it must associate with outside advocates (military recruiters) and help them affirmatively and publicly advance a cause (military recruiting) on behalf of a specific governmental entity that engages in acts it finds abhorrent (employment discrimination) against the institution's own constituency (its students).[4]

Endorsement. Similarly, in each of the contexts enumerated above, the "crucial" feature is not whether some audience or constituent would misinterpret the forced association as an endorsement (the government's second

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[4] It matters not that the government thinks of the intrusion as "temporary" or "episodic," U.S. Br. at 20. *See Hurley*, 515 U.S. at 560-61 (a single parade lasting a few hours). But as both the court of appeals and the district court recognized, it is neither. The military demands frequent and ongoing assistance. *See* P.A. 34a, 102a. It is not just a visit; it is a collaboration.

purported element). For purposes of the right not to associate, it is not dispositive whether "[s]tudents and the public both can readily understand that military recruiters speak for the military." U.S. Br. at 20. Nor, as *Dale* itself illustrates, is the infringement excused just because the institution is free "to explain why" it is associating against its principles. *Id.* at 22; *see Dale*, 530 U.S. at 653-55.

Rather, as in the analogous compelled speech context, *see supra* at 23-25, the central question is the extent to which the forced association violates some political, moral, or religious value the group shares. *See Dale*, 530 U.S. at 655; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). That is what this Court means when it defines the right of "expressive" association as emerging out of a shared interest in "advocat[ing] public or private viewpoints." *Dale*, 530 U.S. at 648.

The inapt analogy to antidiscrimination laws. Of course, just because an organization claims an expressive purpose in declining to associate with some individual or institution does not mean that the government can never force the association anyway. Like any other First Amendment right, the freedom not to associate must be balanced against the government's asserted interest in forcing the association. Antidiscrimination laws illustrate the balance. *See Roberts*, 468 U.S. at 623. The government may prohibit an employer from declining to associate with an employee for racist or sexist reasons. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). It may prohibit a business association or social club from refusing to associate women or African Americans as members. *See, e.g., N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13-14 (1988) (race and sex); *Roberts*, 468 U.S. at 623-25 (sex). It may prohibit a university from discriminating in admissions. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 176 (1976). In each context, this Court has held that the government's compelling interest in eradicating discrimination outweighs

the asserted interest in discriminating. *See, e.g.*, *Roberts*, 468 U.S. at 628; *see also Hurley*, 515 U.S. at 572 (antidiscrimination statutes "do not, as a general matter, violate the First ... Amendment[]").

Even so, the Court has emphasized that there can be circumstances where the balance falls the other way, where discrimination is so integral to an organization's identity, or to the message its members have gathered to communicate, that the right not to associate trumps even the government's weighty interest in opposing discrimination. *Dale* and *Hurley* were such cases. *See also Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 288-90 (D. Md. 1988) (Ku Klux Klan cannot be forced to admit Jews or African-Americans to its ranks or to its parades).

From these principles, it follows that the government is absolutely correct that "[e]ducational institutions do not have any unique constitutional immunity" from antidiscrimination laws and that "[a] school could not, for example, assert a '*Dale* right' to exclude minority-owned enterprises from the recruiting process." U.S. Br. at 19, 20. But that is not because a school has no constitutionally protected interest in deciding, on the basis of principles and values, whether or not to associate with, or assist, a particular outsider. Rather, it is because the balance of interests falls decidedly against a school's claimed right to discriminate invidiously. This proposition is undoubtedly true where (as is almost always the case) discrimination is not a central tenet of a school's expressive identity, *see Runyon*, 427 U.S. at 176; *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984), and, because of the singular imperative of eradicating discrimination in education, perhaps even when it is, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Norwood v. Harrison*, 413 U.S. 455, 463-68 (1973). Simply put, "'the Constitution ... places no value on discrimination,'" *Runyon*, 427 U.S. at 176 (quoting *Norwood*, 413 U.S. at 469), and a

high priority on "eradicating discrimination," *Roberts*, 468 U.S. at 623.

That a state may prohibit the ordinary school from discriminating invidiously in admissions, hiring, or business interactions, then, simply does not prove that the government has *carte blanche* to require schools to associate with military recruiters by assisting them in their recruiting efforts. And it certainly does not prove that forced assistance to military recruiters entails no infringement on associational rights. Whether this particular infringement is permissible depends here, as it always does, on a discrete balancing of the degree of infringement (addressed up to this point in this argument) against the government's asserted need to infringe as it has chosen to do (addressed *infra* at 41-50).

It is, indeed, incongruous that the government would invoke laws directed at prohibiting discrimination to justify punishing schools for refusing to assist discrimination. U.S. Br. at 19. The irony is only deepened by the government's suggestion that the *law schools* are the ones denying students "equal access to employment opportunities." *Id.*

II. UNDER THE FIRST AMENDMENT, THE SOLOMON AMENDMENT'S PENALTY, A UNIVERSITY-WIDE BAN ON ALL FEDERAL FUNDING, IS TREATED THE SAME AS A COMMAND.

Representative Solomon drew the linkage that is anathema to the First Amendment when he described the premise of his legislation: It "tell[s] recipients of Federal money ... that if you do not like the Armed Forces, if you do not like its policies, ... [t]hat is your first-amendment right[]. But do not expect Federal dollars ...." 140 Cong. Rec. 11,439. Congress has since taken to the furthest possible extreme Representative Pombo's pithier formulation that the academy's "starry-eyed idealism comes with a price." *Id.* at 11,441.

The price is dear for a law school's right to stand by its antidiscrimination policy: The government cuts off almost every penny of federal money to the law school and to any department within the university from Astrophysics to Zoology. If a law school faculty refuses to disseminate and support the military's recruiting messages, the federal government will cancel not just funding for recruiting, not just funding for the law school, not just funding for national security or defense initiatives, but *any* federal funding to anyone on campus. So when the government describes the Solomon Amendment as covering "specified federal funds," *see* U.S. Br. at I, 6, 16, that is a coy way of describing a penalty that encompasses almost all grants and contracts administered by every agency that funds academic institutions. The price tag for some academic institutions is as high as several hundred million dollars. *E.g.*, J.A. 85-86, 147, 163. Never in First Amendment history has the government tried to exact a price that high for expression that remote. As the court of appeals held, Congress' effort to do so here is a classic case for application of the doctrine of unconstitutional conditions. P.A. 11a-12a & n. 9.

Generally, Congress has plenary power under the Spending Clause to impose conditions on the receipt of federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). But as the leading Spending Clause case recognized, the Spending Clause, like all other powers enumerated in the Constitution, is constrained by the Bill of Rights. *See id.* For almost half a century, this Court has confirmed that when it comes to civil liberties, the government cannot attach strings to a benefit to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In short, the doctrine holds that the government may not exact a "price" for "starry-eyed idealism" or any other expression it disfavors.

The prototype for the unconstitutional conditions doctrine is *Speiser*, a compelled speech case, where this Court held that a state could not condition a property tax exemption for veterans on their willingness to sign a loyalty oath. 357 U.S. at 518. In striking the condition on First Amendment grounds, this Court held: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Id.*; *see, e.g.*, *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Sherbert v. Verner*, 374 U.S. 398, 405-06 (1963). The principle is especially apt here, since a university-wide cut-off of the "benefit" of all federal funds and contracts is harsher than the penalty Congress attaches to almost any direct command, including the prohibition against criminal fraud—so harsh, in fact, that every school in the country that was receiving federal money has relented. *Cf. NEA v. Finley*, 524 U.S. 569, 596 (1998) (Scalia, J., concurring in the judgment) ("[D]enial of participation in a tax exemption or other subsidy scheme ... does not, as a general rule, have any significant coercive effect.").

The only exception this Court has ever recognized is where the government creates a *program* and wishes "simply [to] insist[] that [those specified] public funds be spent for the purposes for which they were authorized," and not for other purposes. *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *see Finley*, 524 U.S. at 587-88; *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 211 (2003). Only in that context has the Court ever held, as the government broadly asserts, "that Congress has authority under the Spending Clause to establish criteria for the receipt of federal funding 'that would be impermissible were direct regulation of speech ... at stake.'" U.S. Br. at 40 (quoting *Finley*, 524 U.S. at 588). But this Court has never departed from the core principle of the doctrine of unconstitutional conditions, that the government may not "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service,

thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197 (emphasis in original); *see Am. Library Ass'n*, 539 U.S. at 210-11; *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

Under these cases, the federal government could make grants earmarked to promoting military recruiting. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *cf.* Texas Br. at 11-12. But if the First Amendment does not permit the direct command, it does not permit the government to threaten to cut off almost every penny in unrelated funds to a school—much less to an entire university—for the refusal to support the government's message, for a simple reason: *An entire university is not a government program. See generally* AAUP Br. at 22-30 (discussing unconstitutional conditions doctrine). Harvard University does not become a government program, and especially not a program obliged to carry the government's message, just because one of its professors or one of its departments secures support from some federal agency or provides the agency with a contractual service. It would be absurd to claim that funds for cancer research or particle accelerators are not "spent for the purposes for which they were authorized," *Rust*, 500 U.S. at 196, just because the law school across campus declines to service JAG Corps recruiters. The very notion runs afoul of this Court's admonition that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). That is why the government did not even suggest to the court of appeals—as it does to this Court—that the constitutional strictures are relaxed because "the Solomon Amendment is a condition on funding, not a direct regulatory mandate." U.S. Br. at 13; *see* U.S. CA Br. at 44.

The government now constructs much of its appeal around the opposite view, couched both as several arguments that the nature of the penalty means there is no First Amendment infringement at all, *see* U.S. Br. at 18, 24-25, and as an argument that conditions on funding are evaluated by a lower standard, *see id.* at 39-43. They are all different ways of saying the same thing, and they all run headlong into almost half a century of doctrine. For example, even if it is true that "[t]he United States is doing no more than any donor to an institution of higher education might reasonably do," *id.* at 24, the point is constitutionally irrelevant. So, too, is the suggestion (which the record disproves) that universities with hundreds of millions of dollars at stake have "the same option anyone has to decline to accept a contract offer that he believes is not justified." *Id.* at 40; *see also* Columbia Univ. Br. at 11-16. The very premise of the unconstitutional conditions doctrine is that the government is not just "any donor" and is unlike any other contract partner. *See Speiser*, 357 U.S. at 526; *Perry*, 408 U.S. at 597. Unlike all other donors and contracting partners, the government is bound by the Bill of Rights. So, when constitutional rights are in play, it is simply no answer to say, as the government repeatedly does, that "[i]f institutions of higher education do not wish to associate with military recruiters, they may simply decline to associate themselves with the government's money." U.S. Br. at 23-24; *see id.* at 13, 16. One researcher's decision to "associate ... with the government's money" may preclude him from bragging he does not "associate" with the government, but it does not convert him and everyone else in the university into the mouthpiece of every government agency with a message to deliver or a cause to press.

Contrary to the government's assertion, *Grove City College v. Bell*, 465 U.S. 555 (1984), does not carve out some huge exception to the doctrine, and certainly not one that turns entire universities into government lackeys. *See* U.S. Br. at 24. The case held that if a university receives a

specified type of federal funding—there, a voucher program that defrays certain costs for some students—the school may not administer *that specific* program in a manner that violates the government's prohibition against gender discrimination. 465 U.S. at 575. Thus, the case, as framed by the Court, was a classic case of the government specifying how it wanted its own funds expended. The Court expended five sentences on the school's First Amendment objection, which warranted "only brief consideration" because the peculiar right asserted was trivial. *Id.* The school did not discriminate on the basis of gender, and claimed no First Amendment right to do so. *See id.* at 577 (Powell, J., concurring); Brief for Petitioners at 3, *Grove City Coll.*, 465 U.S. 555 (No. 82-792), 1982 U.S. Briefs LEXIS 792. The right it asserted was the rather transcendental right to *choose*, of its own free will, to refrain from invidious discrimination, but not to *obligate* itself to the government to do so. Brief for Petitioners (No. 82-792), at 47-50.[5] *See generally* Bay Area Lawyers for Indiv. Freedom (BALIF) Br. at 19-30 (rejecting argument that striking the Solomon Amendment would endanger civil rights laws); AAUP Br. at 29-30 (same).

The government argues in various ways that the doctrine does not apply to the particular categories of First Amendment rights at issue here. For example, when the government argues that "[e]ducational institutions covered by the Solomon Amendment have not been *compelled* to do

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[5] Congress has since amended the statute to suspend the relevant funds if any portion of the school discriminates. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28-29 (1988). But even those strictures are distinguishable from the Solomon Amendment for two reasons. First, as demonstrated above, the command not to discriminate would be constitutional at least as applied to the usual school. *See supra* at 34-35. Second, antidiscrimination legislation is unique in that this is the only arena in which the government not only has a compelling interest in regulating conduct—there, "eradicating ... discrimination"—but also an independent interest "in denying public support to racial discrimination in education." *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 & n.29 (1983).

anything," for they are free to "decline federal assistance," U.S. Br. at 32 (emphasis in original), it is arguing that the doctrine of unconstitutional conditions does not apply to compelled speech violations. And when the government rejects the "view that an educational institution may voluntarily associate itself with the government's money, and then claim a First Amendment right not to associate with the government," *id.* at 18, it appears to be arguing that the doctrine of unconstitutional conditions has no application to claims of free association.

The cases prove otherwise. The doctrine of unconstitutional conditions applies to the entire panoply of First Amendment rights, from free exercise, *see, e.g.*, *Sherbert*, 374 U.S. at 404-06, to free speech, *see, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), to free press, *see, e.g.*, *League of Women Voters*, 468 U.S. at 399-401, to the right to petition government, *see, e.g.*, *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46 (1983), to the right to associate and not to associate, *see, e.g.*, *O'Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712, 716-17 (1996); *Elrod v. Burns*, 427 U.S. 347, 358-59 (1976), to the right that launched the doctrine in the first place—the freedom *not* to speak, *see Speiser*, 357 U.S. at 526.

III. THE SOLOMON AMENDMENT CANNOT SURVIVE CONSTITUTIONAL SCRUTINY.

A. The Solomon Amendment Is Subject to Strict Scrutiny.

The court of appeals was correct in concluding that the Solomon Amendment is subject to strict scrutiny. *See* P.A. 41a-43a. That conclusion flows in the first instance from the simple fact that the military has a message. The statute is directed at requiring schools to provide a particular level of access to military personnel to engage in one activity—"*for purposes of military recruiting*," which is to say, to advocate a particular career path. 10 U.S.C. § 983(b)(1) (emphasis

added). The conclusion flows also from the undisputed reality that the law schools must disseminate speech to comply with the most-favored-recruiter command. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 9 (1986). And it flows from the manner in which the Solomon Amendment overrides a school's own choices about what causes to support and what speakers to associate with. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 576 (1995).

Abandoning yet another concession it made below, *see, e.g.*, U.S. CA Br. at 22, the government rejects not just strict scrutiny, but *even intermediate scrutiny*, arguing, now, that even the more permissive standard of *United States v. O'Brien*, 391 U.S. 367 (1968), is inapplicable. *See* U.S. Br. at 32-35. This position revolves around characterizing the Solomon Amendment as a regulation of "conduct" alone, with virtually no speech implications—akin to "walking down the street," *id.* at 33 (internal quotation marks omitted), or "arson of a government building," *id.* at 35. But like its incantation of the word "access," the government's invocation of the term "conduct" masks the reality that all the "conduct" the Solomon Amendment requires is communicative to the core. *See supra* at 21-22. These modes of expression depend upon physical activity (or forbearance from action), but that hardly transforms them from speech into conduct. As this Court has held, the conduct component does not even suffice to downgrade the scrutiny level from strict to intermediate, much less obviate all scrutiny. *See Wooley v. Maynard*, 430 U.S. 705, 713 & n.10 (1997); *Dale*, 530 U.S. at 659.

Strict scrutiny is the appropriate standard for an additional reason: The Solomon Amendment regulates speech on the basis of viewpoint, which necessarily requires strict scrutiny—even if the law school's expressive activity would otherwise deserve diminished First Amendment

protection. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (viewpoint-based regulations are "presumptively unconstitutional in funding, as in other contexts" (internal quotation marks omitted)). The viewpoint-based nature of the regulation appears on the face of the statute. The Solomon Amendment promotes exactly one viewpoint—the government's pro-military viewpoint—triggering the admonition that "[t]he government may not regulate [speech] based on hostility—*or favoritism*—towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386 (emphasis added); *see Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (mandatory student activity fee is unconstitutional to the extent funds are allocated on the basis of majority's viewpoint); *Hurley*, 515 U.S. at 579 (viewpoint discrimination is "*promoting an approved* message or discouraging a disfavored one" (emphasis added)); ACLU Br. at 15-20.[6]

B. The Solomon Amendment Cannot Survive Strict or Intermediate Scrutiny.

The government does not even try to justify any of the demands Congress made—including the demand of campus entry alone—under strict scrutiny, which would require proof that the goals "'cannot be achieved through means

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[6] The viewpoint-specific scope of the regulation is starker when the focus shifts beyond what the Solomon Amendment covers toward what it excludes. The Solomon Amendment, as written by Congress and implemented by DOD, does not penalize every school that declines to assist the military, but only those schools that target the military *in protest*. Exempt from the penalty is any law school that bars military recruiters at the gates because "all employers are similarly excluded," 32 C.F.R. § 216.4(c)(3), because students have not expressed interest, *id.* § 216.4(c)(6)(ii), or because of "a longstanding policy of pacifism." 10 U.S.C. § 983(c)(2). Every conceivable non-protest reason to exclude the military is exempted. *See Texas v. Johnson*, 491 U.S. 397, 417 (1989). *See generally* BALIF Br. at 15-19.

significantly less restrictive of [First Amendment] freedoms.'" *Dale*, 530 U.S. at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). The government reserves its energies for intermediate scrutiny, which requires it to prove that "'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner Broad. Sys.*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377).

Obviously, military recruiting is an important, even compelling, government interest. *See* U.S. Const. art. I, § 8, cl. 12. So, too, we may presume, is the interest in recruiting lawyers. But where, as here, constitutional rights are at stake, the government must do more than just waft around an interest and call it a day. *See* P.A. 45a. The government must also demonstrate that it is addressing an actual problem, rather than "simply posit[ing] the existence of the disease sought to be cured." *Turner Broad. Sys.*, 512 U.S. at 664 (plurality) (internal quotation marks omitted). And it must justify the "means chosen" to advance the interest. *Id.* at 662; *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The government has done neither, arguing, incorrectly, that it need not.

1. *The Disease Congress Sought to Cure Is Not Real.*

If the "disease sought to be cured" was the one the Solomon Amendment sponsors posited most vocally and the military has stressed almost exclusively—the perceived "backhanded slap at the honor and dignity of ... our Nation's Armed Forces," 140 Cong. Rec. 11,441 (Rep. Pombo), and the "message that employment in the Armed Forces ... is less honorable," J.A. 132—then, it goes without saying, that the Solomon Amendment would fail under any standard of review. The asserted purpose must be "unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623; *see O'Brien*, 391 U.S. at 377.

The government posits that the disease sought to be cured was the "harm to military recruiting that arises" from the "act of restricting campus access." U.S. Br. at 35. But there is no reason to believe that was a real disease. *See generally* Servicemembers Legal Def. Network (SLDN) Br. at 17-23 (reviewing evidence on need for Solomon Amendment). The congressional sponsors spoke only of "some" schools, *e.g.*, 140 Cong. Rec. 9292 (1994), and the record in this case reflects that virtually no law school barred military recruiters at the gates, but merely offered them something less than most-favored-recruiter status. Even so, the record demonstrates that the JAG Corps has had a glut of highly qualified applicants. *See supra* at 11. The disease was the recruiting equivalent of a wart—annoying, perhaps, and embarrassing, but hardly incapacitating.

Several of the government's amici raise the prospect of mass evictions of military recruiters from undergraduate campuses, and the government faults the court of appeals for its focus on recruiting at law schools. U.S. Br. at 39 n.6. But the record is devoid of evidence that undergraduate institutions have been any more inclined than law schools to bar military recruiters from campus. If anything, the record suggests that their antidiscrimination policies tend not to cover recruiting assistance. *See* J.A. 32-33, 56, 150-51. The reason is that this case was brought by law schools, law faculty, and law students, and the relief requested was to enjoin enforcement of the Solomon Amendment against law schools. *See* P.A. 55a; J.A. 29-30. If the government wishes to justify infringing the First Amendment rights of law schools, it has to prove that the disease festers there, not clear across campus. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263-65 (1986).

2. *The Solomon Amendment's Means Are Not Fitted to the Disease.*

Most-favored-recruiter status. If, as the government asserts, the disease was the "harm to military recruiting"

from "restricting campus access," U.S. Br. at 35, the ill fit is immediately apparent. This harm would be addressed completely by requiring campus access. But since the "means chosen," was not just a demand to enter campus, nor merely a demand to have access to students, it is not enough for the government to prove (nor, obviously, to assert without proof) that "on-campus recruiting furthers the government's interest," *id.* at 36, or that "personal access to students on campus enhances recruitment," *id.* at 36-37. Since Congress chose to demand that military recruiters get the benefit of *every single communicative service* the school might provide to some other employer, these are the means the government must justify.

The government has not even tried to explain, under any level of scrutiny, why Congress needed to codify into law the military's recent most-favored-recruiter policy, penalizing schools for treating the military differently in ways that, while rich in symbolic protest, could not have harmed recruiting results.[7] There is no plausible reason, for example, why Congress needed to adopt a rule that punishes Yale for relying on its *college* personnel to make appointments for recruiters, rather than *law school* personnel. J.A. 122. No plausible recruiting need is served by punishing Boston College for putting military recruiting literature on reserve in the library rather than in the career services office, J.A. 218-19, except perhaps for the unlikely need to recruit only lawyers who are lazy or allergic to libraries.

The government cannot make up for the poor fit by asserting that "the Solomon Amendment relies on the

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[7] Tellingly, the government's various amici follow suit, addressing only the effects of "[b]anning military recruiters from campus," Abbot Br. at 19, "halt[ing] military recruiters at the[] gates," Am. Legion Br. at 4, and preventing "face-to-face interaction" between recruiters and students, Judge Advocates Ass'n Br. at 15 (internal quotation marks omitted).

educational institutions' own assessments of what is *required* for effective recruiting on their campuses." U.S. Br. at 37 (emphasis changed). When law schools choose to expend their scarce resources to promote certain employers, that is not a judgment of what is "required" for any particular employer to recruit effectively, and it certainly is not a judgment of what assistance is "integral" to a military with more resources and vehicles of recruiting than any other employer. *Id.* It is simply a judgment to associate with, and promote, one group of employers and not another, for the benefit of the school's students. That judgment cannot support the government's demand for like treatment any more than a newspaper's judgment to allot editorial space to some candidates entitles others to insist that equal space is "required." *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

In truth, the observation that "the Solomon Amendment does not prescribe any fixed level of access that educational institutions must afford to military recruiters," U.S. Br. at 16, only underscores the poor fit between the disease and the cure. If any incursion into First Amendment rights is justified at all, it would be only that level of intrusion that would satisfy *the military's* actual needs. Without so much as an assertion that the military cannot fill its needs unless it gets what Congress demands—every single service that might be provided to some other employer—the Solomon Amendment must fail. *See* NALP Br. at 9-16 (explaining employers' differential recruiting needs, and especially differences between unknown and prominent recruiters).

Entry to campus. Even as to the Solomon Amendment's more modest commands—that law schools provide some affirmative support, or simply allow entry to campus—the government did not produce a "shred of evidence." P.A. 24a.[8] That is why the court of appeals concluded that "the

[8] Contrary to the government's suggestion, the evidentiary vacuum was a matter of litigation strategy, not limited time. *See* U.S. Br. at 8;

Solomon Amendment could barely be tailored more broadly." P.A. 23a.

Instead, as it did below, the government appeals to "common sense," P.A. 45a, citing cases where additional evidence was not required, because the match between the government's purpose and the means chosen was self-evident. *See* U.S Br. at 38. But, as the court of appeals found, this is not such a case. P.A. 45a. It is not at all obvious that the various alternative recruiting methods the military has at its disposal would be inferior. *See generally* SLDN Br. at 26-27 (describing vehicles). The government points to no evidence that the military would fail to recruit qualified candidates by approaching them directly, armed with the contact information that schools are legally obligated to supply, *see* 10 U.S.C. § 983(b)(2); by participating in or organizing recruiting events and symposia not affiliated with law schools; by offering attractive financial incentives, in the form of loan repayment and tuition remission; or by purchasing media advertising (as it already does) on a scale that is beyond the capacity of virtually any other employer. P.A. 23a; *see* Judge Advocates Ass'n Br. at A-1 (reporting military's $1.2 billion budget for recruiting and advertising). As the court of appeals noted, these other approaches "might actually fare better than the current system," because "the Solomon Amendment, which has generated much ill will toward the military on law school campuses, actually impedes recruitment." P.A. 24a (footnote omitted); *see* J.A. 183-87 (law dean urges military to interview off campus because it will be more effective).

Pet'n at 6. The district court did not rule on the preliminary injunction for almost two months, during which time the government could have supplemented its papers. In a parallel case, the government pursued the same strategy, on a more leisurely summary judgment schedule, resisting the legal claims without presenting evidence. *See Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 164-65 (D. Conn. 2005).

3. *The Solomon Amendment Is Not Entitled to Deference.*

The government's main defense, as to both the disease and the cure, is to argue that it does not need to prove either because (1) the very passage of "[t]he Solomon Amendment reflects Congress's judgment" on the matter, U.S. Br. at 36; and (2) this Court should defer to Congress, *id.* at 38. Both the premise and the conclusion are flawed.

The premise is flawed because there is little reason to think Congress made any such judgment about military necessity. All Congress did was to enact the demand. Without legislative findings, there is no way to confirm which of the two posited diseases it was curing—the perceived "slap" or the hypothetical, but undocumented, impact on recruiting. The legislative record suggests that a needs assessment was not foremost on Congress' mind. Congress held no hearings. So far as appears from the debate, and from a review of every committee hearing on military needs in the past decade, Congress had no data about how well various sorts of recruiting efforts worked. In the first instance, Congress was acting against the military's recommendation, and later the only formal input it received from the military was the letter (described *supra* at 13) bemoaning student protests and stating the bare conclusion that the most-favored-recruiter principle was necessary and "intransigence ... is intolerable." H.R. Rep. No. 108-443, pt. 1, at 7.

As to the conclusion, Congress does not get deference just because it passes a law. *See United States v. Morrison*, 529 U.S. 598, 614 (2000). Even under intermediate scrutiny, the government must prove "that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys.*, 512 U.S. at 666.

The ordinary rules of judicial scrutiny are not suspended just because the *military* is the entity infringing on the academy's constitutional rights. *See generally* SLDN Br. at 9-16 (exploring military deference). The courts traditionally defer to the military, and to political branches on matters of military affairs, when it comes to the "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), including its personnel policies, judgments about troop morale, regulation of troop behavior, regulation of activities on its own bases, and, of course, strategic decisions on how to win wars. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986); *Rostker v. Goldberg*, 453 U.S. 57, 69-70 (1981); *Greer v. Spock*, 424 U.S. 828 (1976). Deference is appropriate, in other words, in matters on which the military and the political branches are especially expert and the judiciary is especially naïve. *See Goldman*, 475 U.S. at 507-08.

The Solomon Amendment is not about such matters. It is about the military's insistence on reaching beyond its own sphere to compel private organizations to reorganize *themselves* to accommodate and issue its message. This sort of intrusion into the civilian sector is precisely where judicial skepticism of Congress and the military is at its height, especially in light of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird v. Tatum*, 408 U.S. 1, 15 (1972). And this Court, which is no stranger to the law student market, is perfectly competent to assess claims about what services the largest and richest military in history needs from private institutions in order to attract the attention of brilliant young lawyers.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WARRINGTON S. PARKER, III
PETER E. GRATZINGER

HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

E. JOSHUA ROSENKRANZ*
SHARON E. FRASE
JEAN-DAVID BARNEA
ALIYA HAIDER

HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

*Counsel of Record

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No. 04-1152

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE PETITIONERS

Respondents argue that the Solomon Amendment violates their rights to be free from compelled speech, to protest government policy, and to associate for expressive purposes. Those arguments are without merit. More fundamentally, respondents' arguments lose sight of the fact that the Solomon Amendment is not a free-standing requirement, but rather a common-sense condition on funds upon which any donor would insist. The United States makes available substantial federal funding that assists in the education of students, and in return seeks only the same opportunity to recruit those students that is extended to other employers.

A. The Solomon Amendment Does Not Result In A Compelled Speech Violation

1. Respondents argue (Br. 21-22) that the Solomon Amendment violates the First Amendment because it compels educational institutions to speak. In particular, respondents assert that the Solomon Amendment compels educational institutions to put the military's recruitment literature in student mailboxes, post the military's job announcements on bulletin boards, email students about the military's arrival on campus, arrange appointments for students, supply meeting rooms, and reserve spots at job fairs. But any speech under the Solomon Amendment is doubly uncompelled. Institutions can avoid the equal access requirement entirely by declining federal funds. The Solomon Amendment, moreover, does not require institutions to provide military recruiters with any particular type of access. Institutions covered by the Solomon Amendment are free to define the services they provide to recruiters in any way they choose. The Amendment merely requires that they provide

military recruiters the same services that they deem appropriate for other recruiters.[1]

2. a. Even putting aside the first aspect of voluntariness —an institution's option to decline federal funding and its conditions—requiring institutions to provide equal access does not result in a compelled speech violation. Institutions operate widely inclusive recruitment programs, and participating employers have views that span the ideological spectrum. In that context, an equal access requirement—including a requirement that institutions host and carry the recruiting messages of military employers to the same extent as the institutions deem appropriate for other employers—merely ensures that military recruiters are not competitively disadvantaged in their search for qualified applicants; it does not result in institutions' adopting the messages of military recruiters (or any other recruiters) as their own. Absent circumstances not present here (see pp. 4-7, *infra*), when entities merely host and carry the messages of others, and are not required to adopt the messages as their own, no compelled speech violation occurs. See *Turner*

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[1] Because the Solomon Amendment conditions federal assistance on recipients' providing military recruiters with the same level of access as provided to "any" other employer, respondents refer (Br. 7) to it as a "most-favored-recruiter" condition. Respondents do not suggest, however, that institutions provide participating employers varying levels of access. Thus, most-favored-recruiter access and equal access amount to the same thing. Respondents suggest (Br. 2, 5) that the Solomon Amendment establishes a preference for military recruiters because it relieves them from the institutions' requirement to provide equal treatment to homosexuals. The military, however, is not similarly situated with other employers that have policies on the employment of homosexuals. The military's policy is embodied in an Act of Congress, that law has been repeatedly upheld based in part on considerations unique to the military, and respondents have not challenged it here. See U.S. Br. 6-7 & n.1. Moreover, just as respondents do not challenge the military's employment policy, it is not an integral aspect of their legal theory. Respondents' theory would equally entitle them to express their disapproval of the global war on terrorism by excluding military (or Justice Department) recruiters.

Broad. Sys., Inc. v. *FCC*, 512 U.S. 622, 655 (1994); *Pruneyard Shopping Ctr.* v. *Robbins*, 447 U.S. 74, 87 (1980).

Thus, while there is no evidence that any military recruiter has ever said "Son, you have no place in the JAG Corps" (compare Resp. Br. 24, with J.A. 39-40), if such a remark were made, it would be the recruiter's speech, not the school's. Just as educational institutions do not purport to adopt the statements made to students by other recruiters for outside employers, they do not purport to adopt the statements of military recruiters as their own.

The same is true of messages delivered to students through the recruitment office. While respondents complain about activities such as posting the military's job announcements and emailing students about the arrival of military recruiters, the administrative personnel performing those functions act as conduits and facilitators of exchanges between military recruiters and the students, just as they do for other outside employers. They do not purport to act as spokespersons for the military any more than they do for Cravath, the Justice Department, the ACLU, or any other employer. The distinction between the school's own speech and messages it conveys to facilitate its equal access obligations is obvious enough for high school students to grasp, *Westside Cmty. Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990); *id.* at 268 (Marshall, J., concurring in the judgment), and should not be lost on law students. Indeed, the distinction is more obvious in the context of outside employers than for on-campus student groups.

b. Furthermore, a compelled speech problem does not arise simply because a general obligation to provide equal access may, on occasion, require an institution to engage in speech to fulfill that obligation. When the government has authority to regulate conduct, and that conduct is carried out in part through speech, the First Amendment does not prevent inclusion of the speech component of the conduct within the scope of the regulation. See *R.A.V.* v. *City of St. Paul*,

505 U.S. 377, 389 (1992); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 502 (1949). Thus, while an employer that informs a white applicant that there is a job opening is compelled by Title VII to tell a minority applicant the same thing, that does not mean that Title VII is subject to strict scrutiny under the compelled speech doctrine. Instead, because the obligation to speak is simply an ancillary feature of a more general obligation to provide equal employment opportunities without respect to race, no compelled speech issue arises at all. The situation is the same here. Any obligation that an institution's recruiting office has to perform such routine tasks as scheduling interviews for military recruiters or sending emails announcing the arrival of employers simply reflects the fact that the office has already undertaken to perform those functions as part of the bundle of recruiting services it provides to outside employers, and that the institution, by accepting federal funds, has undertaken to provide military recruiters with equal access to those services.

Moreover, recruitment offices are engaged in an inherently commercial function that is analogous to that of any job placement agency: they are seeking to help place individuals with employers. The compelled speech doctrine has far less force in that inherently commercial context. In particular, it does not apply to the furnishing of basic information in that context. *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 (1985). For that reason as well, when a recruitment office relays basic information about the availability of jobs for a wide group of employers, a requirement that it do the same for the military does not result in a compelled speech violation.

c. Respondents contend (Br. 22) that a requirement of equal access to a recruitment program is analogous to a requirement that a parade organizer include an unwanted message in its parade. See *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). That comparison is inapt.

As is true of all parades, the parade in *Hurley* was intended to express the collective views of its participants, 515 U.S. at 568, the parade organizer accordingly selected for inclusion in the parade messages it deemed worthy of presentation, *id.* at 574-575, the public therefore understood the messages to reflect the views of the organizer, *id.* at 575-577, and it was impractical for a moving parade to disclaim an unwanted message, *id.* at 576-577. In those circumstances, the message of any speaker in the parade became the speech of the parade organizer. That is why the Court invalidated as compelled speech a requirement that the parade organizer include an unwanted message in the parade.

An examination of the same factors leads to the opposite conclusion here. Educational institutions do not create recruitment programs as forums for the expression of their own ideological views; they create such programs to facilitate economic opportunities for their students with outside employers. Educational institutions do not approve the recruitment messages of employers that participate in their recruitment programs; they allow their students to judge the merit of the various employers' recruitment messages. And students and the public at large do not attribute to the educational institutions the recruitment messages of the participating outside employers. Cf. *Westside Cmty.*, 496 U.S. at 250; *id.* at 268 (Marshall, J., concurring in the judgment). Nor is it impractical for educational institutions to disavow the military's recruitment messages to the extent they disagree with them. Educational institutions voice their criticisms of government policies all the time (including the policies of government agencies, like the Justice Department, to which they extend full access), and there is no reason why they cannot also effectively differentiate their own views from those of military recruiters.

Respondents argue (Br. 27-28) that recruitment programs are like parades because institutions exclude some speakers based on *conduct* to which the institutions object. But that

does not make the messages of participating recruiters those of the institution. In *Rosenberger*, the university excluded student organizations from an expressive forum based on discriminatory conduct it found objectionable, but that practice did not transform the views of the participating student organizations into those of the university. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823, 834-835, 841-842 (1995). So too here, an institution that excludes some recruiters from its recruitment program based on conduct it finds objectionable does not transform the participating recruiters' speech into its own.

d. The other cases on which respondents rely take them further afield from the context of recruiting by outside employers and do not support their compelled speech claim. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the Court invalidated a requirement that a newspaper publish a reply to its attacks on political candidates. The Court reasoned that newspapers make highly selective editorial judgments about what viewpoints most merit the public's consideration, and protection for those highly selective judgments lies at the core of the Free Press Clause. *Id.* at 258. The Court also emphasized that if States could force newspapers to publish views opposing their own, newspapers would be deterred from voicing controversial views. *Id.* at 257. Those considerations have no application here, which is far removed from the core of the Free Press Clause.

In *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986), the Court invalidated a requirement that an electric company include in its billing envelope messages that opposed the utility's views. The plurality reasoned that the expression in the utility's newsletter went beyond proposing a commercial transaction to include a discussion of issues of public concern, *id.* at 8-9, that an award of access based on the speaker's opposition to the utility's position would discriminate on the basis of viewpoint and deter the utility from speaking, *id.* at 13-14, and that the govern-

ment may not force a speaker to choose between appearing to agree with an opposing message or responding, *id.* at 15. Because the Solomon Amendment's equal access condition applies in the commercial context of recruiting for future employment, requires equal access rather than guaranteed placement of a message, and does not have any of the other features in *Pacific Gas*, that decision is inapposite here.

Finally, in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), the Court invalidated a requirement that a motorist carry on his car an objectionable ideological message. Because of the close personal connection that a motorist has to his car, the Court viewed that requirement as the functional equivalent of a requirement that the individual act as a personal mobile billboard for the State's ideological message. *Id.* at 715; see *Johanns* v. *Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060 (2005) (characterizing *Wooley* as a case in which "an individual [was] obliged personally to express a message he disagree[d] with"); cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). Educational institutions have no such intimate connection to facilities they have opened to outside recruiters, and they cannot sensibly be viewed as personal mobile billboards promoting the messages of military recruiters or other outside recruiters, many of whom offer contradictory messages. Moreover, the State in *Wooley* commandeered a private individual to carry a single ideological message. Educational institutions, by contrast, already carry the commercial messages of numerous employers, and are simply being asked to carry another.

e. Contrary to respondents' contention (Br. 26-28), the government does not argue that attribution is an essential element of every compelled speech claim, or that the practical ability to disclaim a message always negates a compelled speech claim, or that the creation of a broadly inclusive forum for outside speakers who are not selected based on the merit of their messages is inherently incompatible with a compelled speech claim. Rather, the government's position

is that a compelled speech claim depends on all the relevant circumstances, including those three significant factors, and that in this case the relevant circumstances show that there is no compelled speech violation. What is crucial here is that recruiting offices are involved in an inherently commercial activity, that *none* of the factors that the Court has identified as causing a compelled speech problem is present here, that institutions control the nature of access they extend to outside employers, and that the equal access requirement is not triggered to begin with unless the institution has agreed to accept federal funding.

B. The Solomon Amendment Does Not Impermissibly Interfere With An Institution's Right To Protest Government Action Or To Educate Its Students

Respondents argue (Br. 28-30) that the Solomon Amendment violates the First Amendment right of institutions to protest government policy and educate their students. The Solomon Amendment, however, leaves educational institutions entirely free to criticize the government's policies and teach their students whatever lessons they wish. They simply may not do so by interfering with the government's legitimate interest in recruiting students for service in the military.

Respondents claim (Br. 29) that denying equal access is the most effective method for criticizing the government's policy and teaching their students a lesson about discrimination. But the First Amendment does not give a speaker a right to engage in conduct that interferes with the government's legitimate interests simply because the speaker deems that conduct the most effective way to deliver his message. The most effective way to call attention to the plight of the homeless may be to sleep in a public park. But there is no First Amendment right to do so. *Clark* v. *CCNV*, 468 U.S. 288 (1984). The most effective way to protest a tax may be to refuse to pay it. But there is no First Amendment

right to do so. *Livestock Mktg.*, 125 S. Ct. at 2062. As those examples illustrate, the First Amendment does not give a person the right to deliver his message through the means he deems most effective when, as here, its conduct interferes with legitimate government interests. Nor does the Solomon Amendment violate the First Amendment to whatever extent it may lead an institution to explain to its students and supporters why it does not wish to disassociate entirely from the government and military.

Respondents rely on *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), as support for their argument that they have a right to criticize the government and teach their students by denying the military equal access to their students. In that case, the Court held that a State could award damages to merchants who were victims of a boycott to the extent that their losses were caused by violent protest. *Id.* at 916. At the same time, the Court held that the State could not hold individuals and organizations liable for the violence of others simply because they associated with them, *id.* at 916-920, or subject individuals to liability based on their activities in peacefully persuading others to join the boycott, *id.* at 926.

The concerns that animated the decision in *Claiborne* are not present here. The Solomon Amendment does not seek to hold institutions accountable for the activities of others; nor does it seek to hold them accountable for their efforts to persuade others to join their cause. Rather, it addresses their own conduct in denying equal access to military recruiters and attaches consequences to it.

Nor is the conduct of educational institutions in denying equal access to military recruiters analogous to the boycott at issue in *Claiborne* in any other respect. The individuals involved in the boycott in *Claiborne* engaged in a complete refusal to deal. Educational institutions, by contrast, have not sought to sever their relationship with the federal government. That option, with its presumably greater and sim-

pler communicative force, remains available. Instead, respondents wish to deny the military equal access, even as they insist on continuing to receive the government's money. That is equivalent to the individuals in *Claiborne* refusing to spend money at the stores of the merchants, but insisting on a First Amendment right to continued access to the merchandise.

C. The Solomon Amendment Does Not Violate The First Amendment Right To Associate

Respondents argue (Br. 30) that the Solomon Amendment violates an educational institution's right to associate for expressive purposes because it parallels the law invalidated in *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). There are no relevant parallels, however, between this case and *Dale*.

Dale invalidated a state law that required the Boy Scouts to accept gay men as leaders because it intruded on the Boy Scouts' interest in determining its membership, 530 U.S. at 648, and because it forced that organization to send a message to the public on a controversial subject that was contrary to its beliefs. *Id.* at 653-654. The Solomon Amendment, however, is not concerned with an institution's membership criteria or leadership structure; by definition, recruiters are outsiders, and their brief, periodic visits to campus as representatives of their employers does not turn them into members of the institution. *Dale* protects an organization's internal structure, not its dealings with the outside world. And that is particularly true when those dealings relate to employment outside the school. Nor does the Solomon Amendment force an institution to send a message to the public on a controversial issue that is contrary to its beliefs. Just as the views of numerous other recruiters who come to campus are not attributed to the institutions, neither are the views of the military recruiters.

Respondents dispute none of this. Instead, they argue (Br. 31-32) that other decisions of this Court show that a

violation of the right to associate can occur even when the *Dale* conditions are not satisfied. That is true. And the United States has never suggested that an intrusion on internal membership rules and a forced endorsement of a message contrary to belief are necessary preconditions for *all* right-to-associate violations. Rather, faced with a court of appeals decision that relied entirely on *Dale* for its right-to-associate holding, it has argued that they are the necessary preconditions for the specific kind of right-to-associate violation identified in *Dale*. That argument is supported by a straightforward reading of *Dale*, and respondents do not contend otherwise.

Nor do the other cases cited by respondents suggest that a "non-*Dale*" right to associate is violated here. The Solomon Amendment does not prohibit associations from referring individuals to lawyers or from paying persons to advocate their cause. *NAACP* v. *Button*, 371 U.S. 415, 433-436 (1963). *Meyer* v. *Grant*, 486 U.S. 414, 416-417 (1988). It does not require individuals to join a particular political party or support a political candidate as the price of a government contract or job. *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 715-716 (1996); *Elrod* v. *Burns*, 427 U.S. 347, 355-356 (1976) (plurality opinion). It does not prohibit a corporation from spending money to express its position on a public issue. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 767-768 (1978). It does not require individuals to lend financial support to private ideological causes. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 212-213, 222-223, 233-235 (1977). And it does not require disclosure of an organization's members or contributors when the risk of reprisals might deter persons from joining or contributing to the organization. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 453-454, 462-463 (1958); *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 89-90, 96-98 (1982); *Shelton* v. *Tucker*, 364 U.S. 479, 480-481, 486-487 (1960).

Respondents in fact do not claim that the holding of any of those decisions applies here. Instead, they seek to extrapolate from those decisions the more general rule that every time "an organization claims an expressive purpose in declining to associate with some individual," the freedom not to associate must be balanced against the government's interest in requiring the association. Resp. Br. 33. But that view is not grounded in the decisions cited by respondents and has no logical stopping point.

The Court's cases, moreover, affirmatively reject that notion. For example, in *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984), the Court did not hold, as respondents suggest, that a private employer has a presumptive First Amendment right not to hire persons of a particular gender, and that the government may prohibit such conduct only when its interest is sufficiently compelling to overcome the employer's First Amendment right. Instead, the Court held that the Constitution does not affirmatively protect the employer's conduct in the first place. *Id.* at 78. *Hishon*, moreover, involved an employer's decision to select its own employees. Because the Solomon Amendment does not affect internal composition, but only an institution's temporary and episodic relationship with outside employers, there is even less basis for a claim that it impairs the right to associate.

That would be true even if the equal access rule were imposed as a direct mandate. In fact, however, the equal access rule applies only to institutions that voluntarily accept it as a condition of federal funding. In that context, respondents' right-to-associate claim loses all force. An institution may not voluntarily associate itself with the government's money and then credibly claim that it has a right not to associate with the government—especially in the modest manner contemplated by the equal access condition.

D. The Solomon Amendment Does Not Involve Impermissible Viewpoint Discrimination

Respondents argue (Br. 42-43) that the Solomon Amendment is subject to strict scrutiny because it involves a preference for the viewpoint of military recruiters. The Solomon Amendment, however, does not create a viewpoint-based preference. Rather, by its terms, it seeks to ensure only that students have the same access to the views of military recruiters they have to the views of other recruiters. Equal access requirements can always be reconceptualized as a preference for the views that would otherwise be excluded, but that recharacterization is not enough to condemn such requirements. See, *e.g.*, *Westside Cmty.*, *supra*; *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984). In any event, under the government speech doctrine, the government may seek to further its own viewpoint without simultaneously seeking to further different ones. *Rosenberger*, 515 U.S. at 833; *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991).

Respondents also contend (Br. 43 n.6) that the Solomon Amendment involves viewpoint discrimination because it distinguishes between institutions that deny equal access for protest reasons and institutions that deny equal access for any other reason. The Solomon Amendment, however, focuses on an institution's conduct in denying equal access; it is indifferent to the reasons for the denial.[2]

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[2] Respondents similarly err in contending (Br. 43 n.6) that the statutory exception for institutions with longstanding policies of pacifism based on historical religious affiliation (10 U.S.C. 983(c)(2)) creates an impermissible distinction based on viewpoint. That exemption comports with the established policy of excusing military service by persons with religious scruples against war (50 U.S.C. App. 456(j)), as well as a recognition that recruitment is unlikely to be effective at such institutions. The two regulatory provisions cited by respondents are applications of the equal access rule, not exceptions to it. See 32 C.F.R. 216.4(c)(3) (institution does not violate Solomon Amendment when it does not allow access to any other employer); *ibid.* (institution that excludes all employers except in response to student interest does not violate the Solomon Amendment).

E. The Solomon Amendment Is Not Subject To, But In Any Event Satisfies, The *O'Brien* Standard

1. Respondents take issue with the government's position that the Solomon Amendment should not be subjected to scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968), because the Solomon Amendment is directed primarily to conduct. According to respondents (Br. 42), the Solomon Amendment is instead directed to activity that is "communicative to the core." But while the military's recruitment activities are themselves communicative, an institution's action in either preventing or facilitating such communication is conduct at its core. For example, when institutions deny military recruiters access to a building, prevent military recruiters from participating in a job fair, or fail to place a military job announcement on a bulletin board set aside for such announcements, they are engaged primarily in conduct that prevents the military from speaking, not speech of their own. Institutions can also deny equal access through differential treatment that involves speech, such as by failing to send an email alerting students to the military's arrival if they send such an email for other employers. But that is simply an example of speech that is swept up in a statute that is directed to conduct, and the regulation of such speech raises no First Amendment issue See *Giboney*, 336 U.S. at 502; see also *R.A.V.*, 505 U.S. at 389-390.

2. Even if the activities undertaken by institutions were sufficiently communicative to trigger an analysis under *O'Brien*, the Solomon Amendment would readily satisfy that analysis. Relying on a statement made by one of the Solomon Amendment's sponsors, respondents suggest (Br. 44) that the Solomon Amendment is aimed at the suppression of ideas. When taken as a whole, however, the sponsors' statements make clear that they viewed the Solomon Amendment as necessary to further the military's interest in enlisting the

most qualified men and women in the armed services. See U.S. Br. 3-4.

In any event, in conducting the inquiry into whether the purpose of a statute is to suppress ideas, the Court looks not to the statements of individual Members of Congress, but to the face of the statute. *O'Brien*, 391 U.S. at 384. In this case, the statute is addressed to an institution's conduct in denying equal access, conduct that interferes with the Nation's interest in recruiting the most qualified men and women to serve in the armed forces. The terms of the statute leave institutions free to criticize the military on whatever ground they choose without risking the loss of federal funds. Taking advantage of that opportunity, institutions have repeatedly criticized Congress's policy on military service by homosexuals (and other military policies as well), and the Department of Defense has never withdrawn federal funding on that basis. Pet. App. 97a-98a.

3. Respondents contend (Br. 45) that the Solomon Amendment is not addressed to a serious problem. But when the Solomon Amendment was enacted, Congress understood that in recent years the military had been "unable to find enough recruits to fill the current number of slots, especially with high caliber students." 140 Cong. Rec. 11,438 (1994). In a Nation that depends on a volunteer army for its defense, that is a serious problem. Respondents note (Br. 45) that, at the time of enactment, only some schools were denying access. But on a matter as important as the Nation's defense, Congress was not required to wait until the number of schools resisting military recruiters reached crisis proportions. In fact, after the Association of American Law Schools prohibited member schools from giving placement assistance or access to facilities to employers that discriminate on the basis of sexual orientation, J.A. 252, all member schools began to resist the military's recruitment efforts, causing Congress to amend the statute to strengthen the incentives for allowing such recruitment.

Respondents cite (Br. 11, 45) a 1998 letter from a military recruiter informing a law school that non-selection of applicants should not reflect negatively on them because some very qualified applicants would not be selected. See J.A. 156, 169. That recruiter's tactful letter hardly reflects a Defense Department judgment that the Solomon Amendment was unnecessary. Moreover, Congress surely knew that, even if there might be a sufficient number of highly qualified applicants in one year, there was a looming danger that interest in military service might decline, making recruitment on campuses all the more important. Finally, Congress is entitled to conclude that, even in a year with a sufficient number of highly qualified candidates, the military deserves an equal opportunity to recruit the very best.

Respondents argue (Br. 48) that there was no evidence that recruitment on campuses would be more effective than other alternatives. But under *O'Brien*, the question is whether the method chosen by Congress is an effective one, not whether another alternative might work better. *United States* v. *Albertini*, 472 U.S. 675, 689 (1985). Here, Congress reasonably concluded that recruiting on campuses is an effective recruiting method. If it were not, institutions and their departments would not invite employers to campus and employers would not take advantage of the offer.

Respondents argue (Br. 45-46) that whatever justification there is for a bare access condition, there is no justification for an equal access condition. An equal access condition, however, is doubly justified. First, it relies on the institutions' expertise (or alternatively the prevailing market conditions as determined by the institutions in conjunction with competing employers) in deciding how much access is needed for effective recruiting. Respondents assert (Br. 47) that institutions have not made a judgment of what is required for any particular employer to be effective. They have made a judgment, however, on what is *generally* needed for effec-

tive recruitment, and Congress was entitled to rely on that judgment.

Second, the equal access standard ensures that military recruiters will not be competitively disadvantaged in the search for the most highly qualified applicants. Respondents assert (Br. 46) that it should make no difference whether college personnel or law school personnel provide recruiting assistance or whether the military's literature is placed in the library or the recruitment office. But Congress is not required to accept an institution's view that separate and unequal access is good enough, any more than it would have to accept it if the institutions were providing such differential treatment to minority recruiters. A rule of equal treatment ensures a level playing field and avoids difficult case-by-case inquiries into how unequal access affected the bottom-line hiring results.

F. The Spending Clause Provides An Independent Justification For The Solomon Amendment

1. Respondents argue (Br. 35-41) that Congress may not mandate the equal access condition directly, and that it therefore may not impose it as a condition of federal funding either. For reasons already discussed, a direct mandate would not violate the First Amendment. Even if Congress lacked the authority to impose the equal access rule directly, however, it would still be constitutional as a condition of federal assistance. Respondents' contrary view is inconsistent with the Court's holding that Congress has authority under the Spending Clause to establish criteria for the receipt of federal funding "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *National Endowment for the Arts (NEA)* v. *Finley*, 524 U.S. 569, 588 (1998). Whatever the outer limits of Congress's authority to establish "reasonable and unambiguous conditions to federal financial assistance," see *Grove City*, 465 U.S. at 575, they are not exceeded here by a common-sense condi-

tion upon which any donor would insist—that the donor have an equal opportunity to recruit students whose education it helped to fund.

Three factors highlight the condition's reasonableness. First, the Solomon Amendment does not prescribe any fixed level of access. It instead asks educational institutions to give the military the same level of access that the institutions deem appropriate for other employers. Second, the Solomon Amendment's equal access condition relates directly to the nature of the funding that is extended. That funding either directly or indirectly supports the education of students, and the Solomon Amendment asks only that institutions give the federal government an equal opportunity to recruit the students whose education it has supported. Third, the Solomon Amendment is addressed solely to an institution's conduct in denying equal access. It is not aimed at unrelated conduct, let alone "at the suppression of dangerous ideas." *NEA*, 524 U.S. at 587 (citations omitted). Far from reflecting any effort to ensure loyalty or orthodoxy, institutions remain free to voice their criticism of the United States and its military on whatever ground they wish. In similar circumstances, the Court has rejected First Amendment challenges to equal access funding conditions. *Grove City*, *supra*; *Westside Cmty.*, *supra*.

2. Respondents contend (Br. 37) that the Solomon Amendment is indistinguishable from a mandate because all educational institutions have agreed to the equal access condition in order to obtain federal funding. But an offer of federal money cannot be deemed coercive "simply by reason of its success in achieving the congressional objective." *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987). An attractive offer is still an offer, not a mandate.

3. Relying on *Rust*, respondents argue (Br. 37-38) that Congress's Spending Clause authority is limited to conditions that are placed on a "program" and does not extend to

conditions that are placed on the "recipient." For several reasons, respondents' reliance on *Rust* is misplaced.

First, the line between a condition on a program and a condition on the recipient was important in *Rust* because the condition at issue prohibited participants in the program from expressing a particular viewpoint. Had Congress imposed that condition on the entity rather than the program, it would have violated the rule that Congress may not in a funding condition aim at the suppression of ideas. The Solomon Amendment, by contrast, aims only at the institutions' conduct in denying equal access; it does not aim at the suppression of any ideas or address the institutions' activities outside of recruiting.

Second, Congress has substantial leeway to define the relevant program. In the statutes that prohibit discrimination in federally assisted programs on the basis of race, sex, disability, and age, Congress has taken an institution-wide approach by defining the relevant federally assisted program as all the operations of a college or university. See 42 U.S.C. 2000d-4a (2)(A), 20 U.S.C. 1687(2)(A), 29 U.S.C. 794(b)(2)(A), and 42 U.S.C. 6107(4)(B)(1). That approach reflects a reasonable judgment that all federal aid to institutions supports the education of students to some degree, and that money that supports one activity can free up money for others. See *Sabri* v. *United States*, 541 U.S. 600, 606 (2004). Congress could reasonably make that same judgment here. Even so, under the Solomon Amendment the only "programs" actually affected are the offices responsible for assisting in recruiting, not all aspects of the institution's operations.[3]

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[3] Respondents argue (Br. 34-35, 40 n.5) that the nondiscrimination statutes are distinguishable because they are supported by a compelling governmental interest in eliminating discrimination. But some funding recipients might argue that there is not a compelling interest in eliminating forms of discrimination that are not subject to heightened scrutiny. In any event, as respondents concede (Br. 44), there is also a compelling governmental interest in meeting the military's recruitment needs. Moreover, under respondents' theory (Br. 34), even a compelling governmental interest would not override a First Amendment claim where institutions have

Finally, the condition at issue in *Rust* sought to affect the recipient's relationship with third parties. By contrast, the Solomon Amendment seeks only to affect a recipient's bilateral relationship with the United States. Congress asks only that, in return for federal funding that assists the education of students, the United States should receive an equal opportunity to recruit those students.[4]

* * * * *

For the foregoing reasons, as well as those in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

OCTOBER 2005

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views on discrimination that are integral to their identity. Thus, under their theory, such institutions would have carte blanche to discriminate against female and minority recruiters and female and minority students, and still receive funds for medical research, as long as they did not discriminate in the administration of the research funds.

[4] Some of respondents' amici (see Amici Brief of 56 Columbia Law School Faculty Members; Amici Brief of William Alford, *et al.*) have argued that institutions do not violate the Solomon Amendment's equal access rule when they treat military recruiters the same way they treat other employers that fail to observe the institutions' nondiscrimination policies. That argument is not within the question presented, and respondents have waived that statutory argument here. Indeed, amici's argument that Congress accomplished almost nothing in the Solomon Amendment provides no basis to enjoin the Amendment as unconstitutional and no basis for affirming the judgment below (which is the burden of a bottom-side brief). In any event, the text of the statute prohibits recipients from denying to military recruiters the level of access "provided to any other employer" (Pet. App. 186a), not the access provided to any other employer with a similar hiring policy. And the background of the 2004 amendments shows that they were intended to provide a firmer statutory foundation for the Department of Defense's interpretation of the predecessor statute, under which it had asked for access without regard to how institutions treated other employers that have policies that limit employment by homosexuals. See H.R. Rep. No. 443, 108th Cong., 2d Sess. Pt. 1, at 6 (2004).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RUMSFELD, SECRETARY OF DEFENSE, ET AL. *v.* FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04–1152. Argued December 6, 2005—Decided March 6, 2006

Respondent Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties, whose members have policies opposing discrimination based on, *inter alia*, sexual orientation. They would like to restrict military recruiting on their campuses because they object to the Government's policy on homosexuals in the military, but the Solomon Amendment—which provides that educational institutions denying military recruiters access equal to that provided other recruiters will lose certain federal funds—forces them to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive those funds. In 2003, FAIR sought a preliminary injunction against enforcement of an earlier version of the Solomon Amendment, arguing that forced inclusion and equal treatment of military recruiters violated its members' First Amendment freedoms of speech and association. Denying relief on the ground that FAIR had not established a likelihood of success on the merits, the District Court concluded that recruiting is conduct, not speech, and thus Congress could regulate any expressive aspect of the military's conduct under *United States* v. *O'Brien*, 391 U. S. 367. The District Court, however, questioned the Department of Defense (DOD) interpretation of the Solomon Amendment, under which law schools must provide recruiters access at least equal to that provided other recruiters. Congress responded to this concern by codifying the DOD's policy. Reversing the District Court's judgment, the Third Circuit concluded that the amended Solomon Amendment violates the unconstitutional conditions doctrine by forcing a law school to choose between surrendering First

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Amendment rights and losing federal funding for its university. The court did not think that *O'Brien* applied, but nonetheless determined that, if the activities were expressive conduct rather than speech, the Solomon Amendment was also unconstitutional under that decision.

Held: Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech and association, the Third Circuit erred in holding that the Solomon Amendment likely violates the First Amendment. Pp. 5–21.

1. The Solomon Amendment should be read the way both the Government and FAIR interpret it: In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access. Contrary to the argument of *amici* law professors, a school excluding military recruiters could not comply with the Solomon Amendment by also excluding any other recruiter that violates its nondiscrimination policy. The Secretary of Defense must compare the military's "access to campuses" and "to students" to "the access to campuses and to students that is provided to any other employer." 10 U. S. C. A. §983. The statute does not focus on the content of a school's recruiting policy, but on the result achieved by the policy. Applying the same policy to all recruiters does not comply with the statute if it results in a greater level of access for other recruiters than for the military. This interpretation is supported by the text of the statute and is necessary to give effect to the Solomon Amendment's recent revision. Pp. 5–8.

2. Under the Solomon Amendment, a university must allow equal access for military recruiters in order to receive certain federal funds. Although there are limits on Congress' ability to condition the receipt of funds, see, *e.g.*, *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 210, a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds. Pp. 8–20.

(a) As a general matter, the Solomon Amendment regulates conduct, not speech. Nevertheless, the Court of Appeals concluded that the statute violates law schools' freedom of speech in a number of ways. First, the law schools must provide military recruiters with some assistance clearly involving speech, such as sending e-mails and distributing flyers, if they provide such services to other recruiters. This speech is subject to First Amendment scrutiny, but the compelled speech here is plainly incidental to the statute's regulation of

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conduct. Compelling a law school that sends e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance to the flag, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, or forcing a Jehovah's Witness to display a particular motto on his license plate, *Wooley* v. *Maynard*, 430 U. S. 705, and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

Second, that military recruiters are, to some extent, speaking while on campus does not mean that the Solomon Amendment unconstitutionally requires laws schools to accommodate the military's message by including those recruiters in interviews and recruiting receptions. This Court has found compelled-speech violations where the complaining speaker's own message was affected by the speech it was forced to accommodate. See, *e.g.*, *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566. Here, however, the schools are not speaking when they host interviews and recruiting receptions. They facilitate recruiting to assist their students in obtaining jobs. Thus, a law school's recruiting services lack the expressive quality of, for example, the parade in *Hurley*. Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what they may say about the military's policies.

Third, freedom of speech can be violated by expressive conduct, but the expressive nature of the conduct regulated by the Solomon Amendment does not bring that conduct within the First Amendment's protection. Unlike flag burning, see *Texas* v. *Johnson*, 491 U. S. 397, the conduct here is not so inherently expressive that it warrants protection under *O'Brien*. Before adoption of the Solomon Amendment's equal-access requirement, law schools expressed their disagreement with the military by treating military recruiters differently from other recruiters. These actions were expressive not because of the conduct but because of the speech that accompanied that conduct. Moreover, even if the Solomon Amendment were regarded as regulating expressive conduct, it would be constitutional under *O'Brien*. Pp. 8–18.

(b) The Solomon Amendment also does not violate the law schools' freedom of expressive association. Unlike *Boy Scouts of America* v. *Dale*, 530 U. S. 640, where the Boy Scouts' freedom of expressive association was violated when a state law required the organization to accept a homosexual scoutmaster, the statute here does not force a law school "'to accept members it does not desire.'" *id.*, at 648. Law schools "associate" with military recruiters in the sense that they interact with them, but recruiters are not part of the school. They are outsiders who come onto campus for the limited purpose of

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trying to hire students—not to become members of the school's expressive association. The freedom of expressive association protects more than a group's membership decisions, reaching activities that affect a group's ability to express its message by making group membership less attractive. But the Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making membership less desirable. Pp. 18–20.

390 F. 3d 219, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1152

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL., PETITIONERS *v.* FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 6, 2006]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

When law schools began restricting the access of military recruiters to their students because of disagreement with the Government's policy on homosexuals in the military, Congress responded by enacting the Solomon Amendment. See 10 U. S. C. A. §983 (Supp. 2005). That provision specifies that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds. The law schools responded by suing, alleging that the Solomon Amendment infringed their First Amendment freedoms of speech and association. The District Court disagreed but was reversed by a divided panel of the Court of Appeals for the Third Circuit, which ordered the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment. We granted certiorari.

I

Respondent Forum for Academic and Institutional

Rights, Inc. (FAIR), is an association of law schools and law faculties. App. 5. Its declared mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." *Id.*, at 6. FAIR members have adopted policies expressing their opposition to discrimination based on, among other factors, sexual orientation. *Id.*, at 18. They would like to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military. See 10 U. S. C. §654.[1] The Solomon Amendment, however, forces institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding.

In 2003, FAIR sought a preliminary injunction against enforcement of the Solomon Amendment, which at that time—it has since been amended—prevented the Department of Defense (DOD) from providing specified federal funds to any institution of higher education "that either prohibits, or in effect prevents" military recruiters "from gaining entry to campuses." §983(b).[2] FAIR considered

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[1]Under this policy, a person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex. Respondents do not challenge that policy in this litigation.

[2]The complaint named numerous other plaintiffs as well. The District Court concluded that each plaintiff had standing to bring this suit. 291 F. Supp. 2d 269, 284–296 (NJ 2003). The Court of Appeals for the Third Circuit agreed with the District Court that FAIR had associational standing to bring this suit on behalf of its members. 390 F. 3d 219, 228, n. 7 (2004). The Court of Appeals did not determine whether the other plaintiffs have standing because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement. *Ibid.* (citing *Bowsher* v. *Synar*, 478 U. S. 714, 721 (1986)). Because we also agree that FAIR has standing, we similarly limit our discussion to FAIR.

the DOD's interpretation of this provision particularly objectionable. Although the statute required only "entry to campuses," the Government—after the terrorist attacks on September 11, 2001—adopted an informal policy of "'requir[ing] universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters.'" 291 F. Supp. 2d 269, 283 (NJ 2003). Prior to the adoption of this policy, some law schools sought to promote their nondiscrimination policies while still complying with the Solomon Amendment by having military recruiters interview on the undergraduate campus. *Id.*, at 282. But under the equal access policy, military recruiters had to be permitted to interview at the law schools, if other recruiters did so.

FAIR argued that this forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association. According to FAIR, the Solomon Amendment was unconstitutional because it forced law schools to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities.

The District Court denied the preliminary injunction on the ground that FAIR had failed to establish a likelihood of success on the merits of its First Amendment claims. The District Court held that inclusion "of an unwanted periodic visitor" did not "significantly affect the law schools' ability to express their particular message or viewpoint." *Id.*, at 304. The District Court based its decision in large part on the determination that recruiting is conduct and not speech, concluding that any expressive aspect of recruiting "is entirely ancillary to its dominant economic purpose." *Id.*, at 308. The District Court held that Congress could regulate this expressive aspect of the conduct under the test set forth in *United States* v. *O'Brien*,

391 U. S. 367 (1968). 291 F. Supp. 2d, at 311–314.

In rejecting FAIR's constitutional claims, the District Court disagreed with "the DOD's proposed interpretation that the statute requires law schools to 'provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers.'" *Id.*, at 321. In response to the District Court's concerns, Congress codified the DOD's informal policy. See H. R. Rep. No. 108–443, pt. 1, p. 6 (2004) (discussing the District Court's decision in this case and stating that the amended statute "would address the court's opinion and codify the equal access standard"). The Solomon Amendment now prevents an institution from receiving certain federal funding if it prohibits military recruiters "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U. S. C. A. §983(b) (Supp. 2005).[3]

FAIR appealed the District Court's judgment, arguing that the recently amended Solomon Amendment was unconstitutional for the same reasons as the earlier version. A divided panel of the Court of Appeals for the Third Circuit agreed. 390 F. 3d 219 (2004). According to the Third Circuit, the Solomon Amendment violated the unconstitutional conditions doctrine because it forced a law school to choose between surrendering First Amendment rights and losing federal funding for its university. *Id.*, at

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[3]The federal funds covered by the Solomon Amendment are specified at 10 U. S. C. A. §983(d)(1) (Supp. 2005) and include funding from the Departments of Defense, Homeland Security, Transportation, Labor, Health and Human Services, and Education, and the Central Intelligence Agency and the National Nuclear Security Administration of the Department of Energy. Funds provided for student financial assistance are not covered. §983(d)(2). The loss of funding applies not only to the particular school denying access but universitywide. §983(b).

229–243. Unlike the District Court, the Court of Appeals did not think that the *O'Brien* analysis applied because the Solomon Amendment, in its view, regulated speech and not simply expressive conduct. 390 F. 3d, at 243–244. The Third Circuit nonetheless determined that if the regulated activities were properly treated as expressive conduct rather than speech, the Solomon Amendment was also unconstitutional under *O'Brien*. 390 F. 3d, at 244–246. As a result, the Court of Appeals reversed and remanded for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment. *Id.*, at 246. A dissenting judge would have applied *O'Brien* and affirmed. 390 F. 3d, at 260–262.

We granted certiorari. 544 U. S. 1017 (2005).

II

The Solomon Amendment denies federal funding to an institution of higher education that "has a policy or practice . . . that either prohibits, or in effect prevents" the military "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U. S. C. A. §983(b) (Supp. 2005). The statute provides an exception for an institution with "a longstanding policy of pacifism based on historical religious affiliation." §983(c)(2). The Government and FAIR agree on what this statute requires: In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.

Certain law professors participating as *amici*, however, argue that the Government and FAIR misinterpret the statute. See Brief for William Alford et al. as *Amici Curiae* 10–18; Brief for 56 Columbia Law School Faculty

Members as *Amici Curiae* 6–15. According to these *amici*, the Solomon Amendment's equal-access requirement is satisfied when an institution applies to military recruiters the same policy it applies to all other recruiters. On this reading, a school excluding military recruiters would comply with the Solomon Amendment so long as it also excluded any other employer that violates its nondiscrimination policy.

In its reply brief, the Government claims that this question is not before the Court because it was neither included in the questions presented nor raised by FAIR. Reply Brief for United States 20, n. 4. But our review may, in our discretion, encompass questions "'fairly included'" within the question presented, *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992), and there can be little doubt that granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says. Nor must we accept an interpretation of a statute simply because it is agreed to by the parties. After all, "[o]ur task is to construe what Congress has enacted." *Duncan* v. *Walker*, 533 U. S. 167, 172 (2001). We think it appropriate in the present case to consider whether institutions can comply with the Solomon Amendment by applying a general nondiscrimination policy to exclude military recruiters.

We conclude that they cannot and that the Government and FAIR correctly interpret the Solomon Amendment. The statute requires the Secretary of Defense to compare the military's "access to campuses" and "access to students" to "the access to campuses and to students that is provided to *any other employer*." (Emphasis added.) The statute does not call for an inquiry into why or how the "other employer" secured its access. Under *amici*'s reading, a military recruiter has the same "access" to campuses and students as, say, a law firm when the law firm is permitted on campus to interview students and the mili-

tary is not. We do not think that the military recruiter has received equal "access" in this situation—regardless of whether the disparate treatment is attributable to the military's failure to comply with the school's nondiscrimination policy.

The Solomon Amendment does not focus on the *content* of a school's recruiting policy, as the *amici* would have it. Instead, it looks to the *result* achieved by the policy and compares the "access . . . provided" military recruiters to that provided other recruiters. Applying the same policy to all recruiters is therefore insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military. Law schools must ensure that their recruiting policy operates in such a way that military recruiters are given access to students at least equal to that "*provided* to any other employer." (Emphasis added.)

Not only does the text support this view, but this interpretation is necessary to give effect to the Solomon Amendment's recent revision. Under the prior version, the statute required "entry" without specifying how military recruiters should be treated once on campus. 10 U. S. C. §983(b). The District Court thought that the DOD policy, which required equal access to students once recruiters were on campus, was unwarranted based on the text of the statute. 291 F. Supp. 2d, at 321. Congress responded directly to this decision by codifying the DOD policy. Under *amici*'s interpretation, this legislative change had no effect—law schools could still restrict military access, so long as they do so under a generally applicable nondiscrimination policy. Worse yet, the legislative change made it *easier* for schools to keep military recruiters out altogether: under the prior version, simple access could not be denied, but under the amended version, access could be denied altogether, so long as a nonmilitary recruiter would also be denied access. That is rather

clearly *not* what Congress had in mind in codifying the DOD policy. We refuse to interpret the Solomon Amendment in a way that negates its recent revision, and indeed would render it a largely meaningless exercise.

We therefore read the Solomon Amendment the way both the Government and FAIR interpret it. It is insufficient for a law school to treat the military as it treats all other employers who violate its nondiscrimination policy. Under the statute, military recruiters must be given the same access as recruiters who comply with the policy.

III

The Constitution grants Congress the power to "provide for the common Defence," "[t]o raise and support Armies," and "[t]o provide and maintain a Navy." Art. I, §8, cls. 1, 12–13. Congress' power in this area "is broad and sweeping," *O'Brien*, 391 U. S., at 377, and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. See *Rostker* v. *Goldberg*, 453 U. S. 57, 67 (1981). But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in *Rostker*, "judicial deference . . . is at its apogee" when Congress legislates under its authority to raise and support armies. *Id.*, at 70.

Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress' decision to proceed indirectly does not reduce the deference given

to Congress in the area of military affairs. Congress' choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.

Congress' power to regulate military recruiting under the Solomon Amendment is arguably greater because universities are free to decline the federal funds. In *Grove City College* v. *Bell*, 465 U. S. 555, 575–576 (1984), we rejected a private college's claim that conditioning federal funds on its compliance with Title IX of the Education Amendments of 1972 violated the First Amendment. We thought this argument "warrant[ed] only brief consideration" because "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.*, at 575. We concluded that no First Amendment violation had occurred—without reviewing the substance of the First Amendment claims—because Grove City could decline the Government's funds. *Id.*, at 575–576.

Other decisions, however, recognize a limit on Congress' ability to place conditions on the receipt of funds. We recently held that "'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 210 (2003) (quoting *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 674 (1996) (some internal quotation marks omitted)). Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.

This case does not require us to determine when a condition placed on university funding goes beyond the "reasonable" choice offered in *Grove City* and becomes an unconstitutional condition. It is clear that a funding

condition cannot be unconstitutional if it could be constitutionally imposed directly. See *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

A

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. See Tr. of Oral Arg. 25 (Solicitor General acknowledging that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests"). As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.

Nevertheless, the Third Circuit concluded that the Solomon Amendment violates law schools' freedom of speech in a number of ways. First, in assisting military recruiters, law schools provide some services, such as sending e-mails and distributing flyers, that clearly involve speech. The Court of Appeals held that in supplying these services law schools are unconstitutionally compelled to speak the Government's message. Second, military recruiters are, to some extent, speaking while they are on campus. The Court of Appeals held that, by forcing law schools to permit the military on campus to express its message, the Solomon Amendment unconstitutionally requires law schools to host or accommodate the military's speech. Third, although the Court of Appeals thought that

the Solomon Amendment regulated speech, it held in the alternative that, if the statute regulates conduct, this conduct is expressive and regulating it unconstitutionally infringes law schools' right to engage in expressive conduct. We consider each issue in turn.[4]

I

Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977), we held unconstitutional another that required New Hampshire motorists to display the state motto—"Live Free or Die"—on their license plates.

The Solomon Amendment does not require any similar expression by law schools. Nonetheless, recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf. See,

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[4]The Court of Appeals also held that the Solomon Amendment violated the First Amendment because it compelled law schools to subsidize the Government's speech "by putting demands on the law schools' employees and resources." 390 F. 3d, at 240. We do not consider the law schools' assistance to raise the issue of subsidizing Government speech as that concept has been used in our cases. See *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550, 559 (2005). The accommodations the law schools must provide to military recruiters are minimal, are not of a monetary nature, and are extended to all employers recruiting on campus, not just the Government. And in *Johanns*, which was decided after the Third Circuit's decision in this case, we noted that our previous compelled-subsidy cases involved subsidizing private speech, and we held that "[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech." *Id.*, at 562. The military recruiters' speech is clearly Government speech.

e.g., App. 169–170; Brief for NALP (National Association for Law Placement) et al. as *Amici Curiae* 11. Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. As FAIR points out, these compelled statements of fact ("The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."), like compelled statements of opinion, are subject to First Amendment scrutiny. See Brief for Respondents 25 (citing *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 797–798 (1988)).

This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.

The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949). Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct"). Compelling a law school that sends scheduling e-mails for other recruiters to send one for a

military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

2

Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 20–21 (1986) (plurality opinion); accord, *id.*, at 25 (Marshall, J., concurring in judgment) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers). Relying on these precedents, the Third Circuit concluded that the Solomon Amendment unconstitutionally compels law schools to accommodate the military's message "[b]y requiring schools to include military recruiters in the interviews and recruiting receptions the schools arrange." 390 F. 3d, at 240.

The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate. The expressive nature of a parade was central to our holding in *Hurley*. 515 U. S., at 568 ("Parades are . . . a form of expression, not just motion, and the inherent expressiveness of marching to make

a point explains our cases involving protest marches"). We concluded that because "every participating unit affects the message conveyed by the [parade's] private organizers," a law dictating that a particular group must be included in the parade "alter[s] the expressive content of th[e] parade." *Id.*, at 572–573. As a result, we held that the State's public accommodation law, as applied to a private parade, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.*, at 573.

The compelled-speech violations in *Tornillo* and *Pacific Gas* also resulted from interference with a speaker's desired message. In *Tornillo*, we recognized that "the compelled printing of a reply . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print," 418 U. S., at 256, and therefore concluded that this right-of-reply statute infringed the newspaper editors' freedom of speech by altering the message the paper wished to express, *id.*, at 258. The same is true in *Pacific Gas*. There, the utility company regularly included its newsletter, which we concluded was protected speech, in its billing envelope. 475 U. S., at 8–9. Thus, when the state agency ordered the utility to send a third-party newsletter four times a year, it interfered with the utility's ability to communicate its own message in its newsletter. A plurality of the Court likened this to the situation in *Tornillo* and held that the forced inclusion of the other newsletter interfered with the utility's own message. 475 U. S., at 16–18.

In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facili-

tate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

The schools respond that if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do. We rejected a similar argument in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980). In that case, we upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property. We explained that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was "not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view." *Id.*, at 88.

The same is true here. Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990) (plurality opinion); accord, *id.*, at 268 (Marshall, J., concurring in judgment); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 841 (1995) (attribution concern "not a plausible fear"). Surely students have not lost that ability by the time they get to law school.

3

Having rejected the view that the Solomon Amendment impermissibly regulates *speech*, we must still consider whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection. In *O'Brien*, we recognized that some forms of "'symbolic speech'" were deserving of First Amendment protection. 391 U. S., at 376. But we rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Ibid.* Instead, we have extended First Amendment protection only to conduct that is inherently expressive. In *Texas* v. *Johnson*, 491 U. S. 397, 406 (1989), for example, we applied *O'Brien* and held that burning the American flag was sufficiently expressive to warrant First Amendment protection.

Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive. Prior to the adoption of the Solomon Amendment's equal-access requirement, law schools "expressed" their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it. For example, the point of requiring military interviews to be conducted on the undergraduate campus is not "overwhelmingly apparent." *Johnson*, *supra*, at 406. An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.

The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is

necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result.

Although the Third Circuit also concluded that *O'Brien* does not apply, it held in the alternative that the Solomon Amendment does not pass muster under *O'Brien* because the Government failed to produce evidence establishing that the Solomon Amendment was necessary and effective. 390 F. 3d, at 245. The Court of Appeals surmised that "the military has ample resources to recruit through alternative means," suggesting "loan repayment programs" and "television and radio advertisements." *Id.*, at 234–235. As a result, the Government—according to the Third Circuit—failed to establish that the statute's burden on speech is no greater than essential to furthering its interest in military recruiting. *Id.*, at 245.

We disagree with the Court of Appeals' reasoning and result. We have held that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States* v. *Albertini*, 472 U. S. 675, 689 (1985). The Solomon Amendment clearly satisfies this requirement. Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers. The

Court of Appeals' proposed alternative methods of recruiting are beside the point. The issue is not whether other means of raising an army and providing for a navy might be adequate. See *id.*, at 689 (regulations are not "invalid simply because there is some imaginable alternative that might be less burdensome on speech"). That is a judgment for Congress, not the courts. See U. S. Const., Art. I, §8, cls. 12–13; *Rostker*, 453 U. S., at 64–65. It suffices that the means chosen by Congress add to the effectiveness of military recruitment. Accordingly, even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under *O'Brien*.

B

The Solomon Amendment does not violate law schools' freedom of speech, but the First Amendment's protection extends beyond the right to speak. We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a "right of expressive association." See, *e.g.*, *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 644 (2000). The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984). If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect. *Ibid.*

FAIR argues that the Solomon Amendment violates law schools' freedom of expressive association. According to FAIR, law schools' ability to express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools' obligation to assist them. Relying heavily on our decision in *Dale*, the Court of Appeals agreed. 390 F. 3d, at 230–235.

In *Dale*, we held that the Boy Scouts' freedom of expressive association was violated by New Jersey's public accommodations law, which required the organization to accept a homosexual as a scoutmaster. After determining that the Boy Scouts was an expressive association, that "the forced inclusion of Dale would significantly affect its expression," and that the State's interests did not justify this intrusion, we concluded that the Boy Scout's First Amendment rights were violated. 530 U. S., at 655–659.

The Solomon Amendment, however, does not similarly affect a law school's associational rights. To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law-school "'to accept members it does not desire.'" *Id.*, at 648 (quoting *Roberts, supra*, at 623). The law schools *say* that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, see *supra*, at 16, so too a speaker cannot "erect a shield" against laws requiring access "simply by asserting" that mere association "would impair its message." 530 U. S., at 653.

FAIR correctly notes that the freedom of expressive association protects more than just a group's membership decisions. For example, we have held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity. *Brown* v. *Socialist Workers '74 Cam-*

paign Comm. (Ohio), 459 U. S. 87, 101–102 (1982), or impose penalties or withhold benefits based on membership in a disfavored group, *Healy* v. *James*, 408 U. S. 169, 180–184 (1972). Although these laws did not directly interfere with an organization's composition, they made group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message.

The Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school's First Amendment rights. A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message.

* * *

In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect. The law schools object to having to treat military recruiters like other recruiters, but that regulation of conduct does not violate the First Amendment. To the extent that the Solomon Amendment incidentally affects expression, the law schools' effort to cast themselves as just like the schoolchildren in *Barnette*, the parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents.

Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association, the Court of

Appeals erred in holding that the Solomon Amendment likely violates the First Amendment. We therefore reverse the judgment of the Third Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.